Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-501 (2)

No.

In The

Supreme Court of the United States

October Term, 1989

Northwestern Indiana Telephone Co., Inc.
and Northwest Indiana CATV, Inc.,
Petitioners,
v.

Federal Communications Commission
and the United States of America,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Russell D. Lukas
Counsel of Record
George L. Lyon, Jr.
Kirby H. Porter
Lee Burdick
Lukas, McGowan, Nace &
Gutierrez, Chartered
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006
(202) 857-3500
Counsel for Petitioners

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

156 pp

TABLE OF CONTENTS

Page

Appendix A

Court of Appeals decision denying petition for review dated April 11, 1989 .... 1a

Court of Appeals order denying petition for rehearing dated June 27, 1989 .... 14a

Court of Appeals order denying petition for rehearing en banc dated June 27, 1989 .... 15a

Court of Appeals judgment denying petition for review dated April 11, 1989 .... 16a

Appendix B

Federal Communications Commission order reaffirming prior Commission order on remand dated May 27, 1988 .... 18a

Appendix C

Court of Appeals decision ordering remand dated July 31, 1987 .... 32a

Court of Appeals judgment ordering remand dated July 31, 1987 .... 44a

Court of Appeals order granting clarification dated November 17, 1987 .... 46a

Appendix D

Federal Communications Commission order imposing forfeiture and granting stay pendente lite dated December 9, 1985 .... 48a

Appendix E

Federal Communications Commission order denying reconsideration of memorandum opinion and order and notice of liability dated August 23, 1985 .... 78a

Appendix F Page

Federal Communications Commission memorandum opinion and order and notice of apparent liability for forfeiture dated March 18, 1985 .... 103a

Appendix G

Statutory provisions 128a

Appendix H

Oral argument of Daniel M. Armstrong on behalf of the Federal Communications Commission and United States of America before the Court of Appeals dated March 6, 1989 .... 133a

Appendix I

Federal Communications Commission memorandum opinion and order granting motion to dismiss cellular radio applications dated July 28, 1989 .... 146a

Appendix J

Federal Communications Commission notice of dismissal of application and motion to dismiss application dated July 7, 1989 .... 148a

Appendix K

Defendants' reply to supplement to plaintiffs' memorandum of points and authorities dated August 11, 1988 .... 151a

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 88-1521

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC. and
NORTHWEST INDIANA CATV, INC.,
Petitioners,

v.

FEDERAL COMMUNICATION COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

U.S. TELEPHONE ASSOCIATION, BELL ATLANTIC TELEPHONE COMPANY, NATIONAL CABLE TELEVISION ASSOCIATION, INC., U.S. CABLE TELEVISION ASSOCIATION, INC., U.S. CABLE OF NORTHERN INDIANA,
Intervenors.

Argued March 6, 1989

Decided April 11, 1989

Petition for Review of an Order of the
Federal Communications Commission

Russell D. Lukas, with whom David L. Nace, Washington, D.C., was on the brief, for petitioners.

John Thorne, Washington, D.C., for petitioner local phone company, and also entered an appearance for intervenor Bell Atlantic Telephone Co.

Daniel M. Armstrong, Associate Gen. Counsel, F.C.C., with whom Diane S. Killory, Gen. Counsel, F.C.C., Gregory M. Christopher, Counsel, F.C.C., Catherine G. O'Sullivan and Marion Jetton, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

H. Bartow Farr, III, with whom Brenda L. Fox, Michael S. Schooler, David L. Nicoll and Charles H. Helein, Washington, D.C., were on the brief, for intervenors.

Martin T. McCue and William Malone, Washington, D.C., entered appearances for intervenor U.S. Telephone Ass'n.

James R. Young and Robert A. Levetown, Washington, D.C., entered appearances, for intervenor Bell Atlantic Telephone Co.

J. Christopher Redding, Washington, D.C., also entered an appearance, for intervenor U.S. Cable of Northern Indiana.

Before WALD, Chief Judge, and ROBINSON, and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge STARR.

STARR, Circuit Judge:

This case is before us a second time. Previously, the court remanded the case to the Federal Communications Commission for clarification of the definitions, under the FCC's cross-ownership regulations, of "affiliate" and "carrier-user" relationships between telephone and cable television companies. *Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205 (D.C.Cir.1987) ("NITCO I"). The FCC having now responded adequately to the concerns that prompted remand, we deny the petition for review.

I

To recap briefly the pertinent facts: In March 1985, the FCC determined that Northwestern Indiana Telephone Company ("NITCO") had violated the FCC's cross-ownership rules by virtue of its direct and indirect connections with Northwest Indiana CATV, Inc. ("Northwest"). *Comark Cable Fund III*, 100 FCC2d 1244, *recon. denied.* 103 FCC2d 600 (1985). The FCC's cross-ownership rules prohibit a telephone company from providing "cable television service to the viewing public in its telephone area, either directly, or indirectly through an affiliate." 47 C.F.R. § 63.54(a) (1988). The regulations also prohibit a telephone company from providing "channels of communications or pole line conduit space" to affiliated cable operators, 47 C.F.R. § 63.54(b) (1988). The pivotal term "affiliate" is broadly defined to include "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship." 47 C.F.R. § 63.54 Note 1(a) (1988).

When this case made its first appearance here, the FCC had concluded that *each* of seven relationships between NITCO (through its president Robert Mussman) and Northwest (through Robert Mussman's son, Rhys Mussman, the president and founder of Northwest) "was and continues to be prohibited by Section 63.54 of our Rules." J.A. at 1598. These relationships were: (1) Robert Mussman's guarantee of bank loans to Northwest; (2) Robert Mussman's guarantee of an indemnity agreement between Rhys Mussman and the Town of Hebron, which received cable service from Northwest; (3) NITCO's payment to Rhys Mussman of consulting fees in excess of Rhys' former salary as Executive Vice President of NITCO; (4) Robert Mussman's lease of office space to Northwest; (5) Robert Mussman's sublease of property to Northwest for "head-end" signal-receiving facilities; (6) NITCO's construction and maintenance of signal distribution facilities for Northwest; and (7) NITCO's lease of pole space to Northwest. J.A. at 1598-99.

Upon review, we discerned two problems with the Commission's order. First, we questioned whether, by stating that *each* of the foregoing transactions (or relationships) was prohibited, the Commission meant to say that affiliate status could be achieved merely by a telephone company's leasing pole space or by its constructing distribution channels for a cable company. We noted that under such an approach telephone companies might be prohibited (under section 63.54(b)) from *ever* providing pole space or distribution channels to cable companies. This result seemed contrary to section 63.57 of the regulations, which provides that the Commission may permit telephone companies to furnish pole space or distribution capacity to non-affiliated cable companies. *NITCO I*, 824 F.2d at 1209; *see also General Tel. Co. of California v. FCC*, 413 F.2d 390, 395-401 (D.C.Cir.1969) (FCC may require telephone companies to obtain a certificate of public convenience and necessity before constructing cable distribution facilities).

Second, we recognized that the Commission had, on two prior occasions, permitted telephone companies to construct distribution channels for cable operators. *NITCO I*, 824 F.2d at 1208-10, citing,, *The Ohio Bell Tel. Co.*, 100 FCC Rcd 942 (1986) (*"Ohio Bell"*); The *Chesapeake & Potomac Tel. Co.*, 57 Red.Reg.2d 1003 (1985) (*"C & P"*). In each of these cases, the Commission had relied on the "carrier-user" exception to the cross-ownership regulations' definition of "affiliate." In its initial orders, however, the FCC did not fully explain why this exception was not also applicable to NITCO and Northwest. We thus directed the Commission to elucidate the essential elements of "affiliate" status and the "carrier-user" exception.

On remand, the FCC explained that it had not intended to treat the leasing of pole space as an indicator of affiliation. J.A. at 2016. Instead, the Commission clarified that "the lease of pole space was a prohibited relationship solely because of our finding of affiliation for other reasons." *Id.* The FCC then reaffirmed its conclusion that NITCO and Northwest were affiliated, relying on the indicia of affiliation in its previous order (except, of course, the lease of pole space) and five other NITCO-Northwest linkages.[1]

Turning to the alleged inconsistency between the treatment afforded NITCO and that afforded the telephone companies in *Ohio Bell* and *C & P*, the Commission explained:

> The carrier-user relationship . . . contemplates transactions that entail a general offer to provide on an indiscriminate basis substantially the same service or services to any and all similarly-situated companies or members of the public. . . . It is NITCO's failure to deal with Northwest on common carrier terms that causes us to conclude that there was no carrier-user relationship.

J.A. at 2016. In contrast, the telephone companies in *Ohio Bell* and *C & P* qualified for carrier-user status because, incident to their certificates of public convenience and necessity, they were obligated to offer cable facilities on a common-carrier basis. J.A. at 2016, 2018 n. 28.

---

[1] The five indicators of affiliation highlighted by the Commission on remand were: (1) Rhys Mussman's serving as NITCO's Executive Vice-President at the same time that he operated Northwest as an individual proprietorship; (2) Rhys Mussman's responsibility, while serving as NITCO's Executive Vice-President, for negotiating pole attachment agreements with competing cable companies; (3) the fact that all contractual agreements between NITCO and Northwest were originally oral; (4) the fact that the consulting agreement between NITCO and Rhys Mussman was oral; and (5) Rhys Mussman's representations to city franchising officials that he was Executive Vice-President of NITCO and his father was Secretary-Treasurer of Northwest. J.A. at 2016.

II

Petitioners' primary contention is that the FCC has, notwithstanding its effort to do so, failed adequately to distinguish the present situation from those in *Ohio Bell* and *C & P*. In particular, they assert that the telephone companies in those two cases also extended credit, entered into consulting agreements or leased property to cable operators. But these similarities are, upon analysis, beside the point. As we have seen, the FCC did not approve the cable facilities in *Ohio Bell* and *C & P* on the ground that no financial or business relationship existed between the telephone and cable companies. Instead, the Commission in those two cases relied on the telephone companies' willingness to serve cable companies on a common-carrier basis. As the FCC emphasized on remand, NITCO, unlike the telephone companies in *Ohio Bell* and *C & P*, failed to avoid the legal consequences of affiliation by offering to serve cable operators on that open-ended basis.

Relatedly, petitioners contend that the FCC failed to provide adequate notice that a telephone company could escape the adverse consequences of affiliation by holding itself out as a common carrier. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 222-24 (D.C.Cir.1981) (regulated parties must have reasonable notice of prohibited conduct). The same contention, however, was rejected in our prior decision. There, we stated that the carrier-user exception "apparently refers to the offerings of a common carrier" and concluded that "we do not see how petitioners could reasonably have believed that *all* of their interconnections fell within that exception." *NITCO I*, 824 F.2d at 1208 & 1209 n. 4. This resolution constitutes the law of the case and, as such, represents a complete answer to petitioners' argument in this respect.[2] *See* C. Wright & A. Miller, 18 Federal Practice & Procedure § 4478 (1981).

Petitioners quibble that *Ohio Bell* and *C & P* should not have been deemed qualified for the carrier-user exception because in each case only one cable company was ultimately awarded a franchise. But this observation fails to distinguish between the availability of common carrier services, on the one hand, and, on the other, the actual provision of common carriage to multiple cable operators. As we understand it, the FCC's interpretation of the carrier-user exception requires only the former (*i.e.*, standing ready to provide common carrier services to any and all users). Indeed, the Commission has placed much emphasis on the fact that Ohio Bell and C & P assumed an obligation (by virtue of their certificates of public convenience and necessity) to provide cable facilities on a common carrier basis. J.A. at 2016, 2018 n. 28. From all that appears, then, the existence of only one franchisee in both the *Ohio Bell* and *C & P* settings resulted not from the telephone companies' refusal to provide common carriage, but from the licensing decisions of the local governments involved. In contrast, the FCC found that NITCO refused to offer similar terms to a competing cable company and reasonably took account of the fact that NITCO has claimed throughout these proceedings that it could serve Northwest on a nontariff basis, that is, without obtaining a certificate of public convenience and necessity. J.A. at 2016.

---

[2] In any event, we note in passing that petitioners' present predicament cannot reasonably be attributed to the alleged vagueness of the cross-ownership regulations. First, it was established long ago that telephone companies are required to obtain Commission approval before constructing or operating cable distribution channels. *General Tel. Co. of California v. FCC*, 413 F.2d at 309 (D.C. Cir. 1969). The application process itself would have provided NITCO, *ex ante*, with particularized regulatory guidance, yet NITCO never sought the required approval. Petitioners have also failed to convince that the Commission's interpretation of the carrier-user exception is unprecedented. The need to eliminate favored treatment of telephone company affiliates is, of course, the cross-ownership rules' *raisòn d'etre*. *In the Matter of Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 FCC Rcd 2d 307, 323-26 (1970) ("Cross-Ownership Rules"). Indeed, the Commission explained its decision in *C & P*, in part, by reference to C & P's "willingness to provide equivalent facilities to others on like terms." *The Chesapeake & Potomac Telephone Company*, 57 Rad.Reg.2d 1003, 1006 (1985); *see also, Comark Cable Fund III v. Northwestern Indiana Telephone Company*, 103 FCC2d 600, 609 (1985) (distinguishing *C & P* on the ground that "we granted an application, duly filed pursuant to Section 214(a) of the Act and our cross-ownership rules, which had sought certification that the public interest would be served by the construction there proposed; . . . *a public offering to be tariffed at the Commission was involved and thus, a 'carrier-user relationship' within the meaning of the sole exception to the broad language in Note 1(a) to Section 63.54*." (emphasis supplied).

Petitioners further contend that in its most recent order the FCC has impermissibly based its finding of affiliation on the totality of the circumstances, instead of specifying which transactions are prohibited by the rules. Petitioners cite *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980) for the proposition that such a "gestalt" approach to agency decision-making is unacceptable. Not quite. In *Leflore*, we stated that an agency normally should not explain its choice of remedies in "gestalt" terms because if one or more elements of the gestalt were flawed, remand might be required to insure that the agency still viewed the particular remedy imposed as appropriate. A *Leflore*-type remand is, however, completely uncalled for here because petitioners have, in light of the regulations' broad sweep, failed to demonstrate that any of the indicia relied up by the FCC for its finding of affiliation was improper. Indeed, in *Leflore* the court *declined* to impose a remand for similar reasons. *Id.* at 463 and n.83.

In sum, the FCC's interpretation of the carrier-user exception reasonably took into account the fact that Ohio Bell and C & P evinced a willingness to deal with cable companies on a common carrier basis, whereas NITCO did not.

III

Petitioners and intervenors, the United States Telephone Association and the Bell Atlantic Corporation, attempt to assert various challenges not raised in the initial proceedings before the Commission and this court. Specifically, petitioners argue that the FCC's cross-ownership regulations cannot continue to be applied in light of the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (Supp.1986), which became effective after initiation of this action, but prior to the Commission's initial order. Petitioners further contend that the cross-ownership prohibitions are unconstitutional on their face and as applied. For their part, the intervenors go even further and contend that the cross-ownership provisions as contained in the Cable Act are facially unconstitutional.

Confronted with this rather daunting fusilade, we refuse to engage in the invited widened battle; in our view, consideration of these arguments cannot be reconciled with well-established principles of waiver, exhaustion of remedies and law of the case.

First. It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand. *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1089-90 (D.C.Cir.1984). This widely-accepted rule furthers the important value of procedural efficiency, 18 C. Wright & A. Miller, Federal Practice & Procedure § 4478 (1981), and prevents the "bizarre result" that "a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Laffey v. Northwest Airlines*, 740 F.2d at 1089-90, quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2dCir.1981), *cert. denied*, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). To be sure, *Laffey* involved a statutory question (failure to contest a formula for calculating back-pay under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982)), but its logic applies to constitutionally grounded arguments as well. This is especially so where, as here, none of the parties have come forward with an explanation (beyond inadvertence) for the failure to properly present these issues in the initial appeal.[3]

Second. Petitioners' Cable Act-based and "as applied" constitutional arguments are also barred by section 405 of the Federal Communications Act. That familiar provision states, in pertinent part:

> The filing of a petition for rehearing shall not be a condition precedent to judicial review of [an FCC deciison] except where the party seeking such review . . . relies on questions of law and fact upon which the Commission . . . has been afforded no opportunity to pass.

47 U.S.C. § 405 (1982). We have repeatedly held that section 405 codifies time-honored exhaustion principles, including the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680-82 (D.C.Cir.1983) quoting, *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952) (emphasis supplied); *see also City of*

---

[3] The *Laffey* rule is of particular importance with respect to the facial constitutional arguments, because such arguments are not generally subject to exhaustion requirements. *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1163 & n. 26 (D.C.Cir.1987).

In this case, there can be no question that petitioners did not present their Cable Act and "as applied" constitutional claims in the initial proceedings before the FCC. *NITCO I*, 824 F.2d at 1209-10 n. 8. Petitioners contend, however, that section 405's exhaustion requirement has been met by virtue of the FCC's having enjoyed an "opportunity" on remand to address these claims. As we just noted, however, exhaustion principles normally require compliance with the agency's procedural rules and rulings). The relevant inquiry is thus whether, in light of petitioners' initial failure to raise constitutional and statutory issues, the Commission erred in not addressing these arguments on remand. We think not.

The Commission determined that consideration of new arguments was not required by the terms of our remand and would not be in the public interest. J.A. at 2019 n.40. That conclusion is unexceptionable. Petitioners admit that nothing prevented them from advancing these arguments in the initial proceedings. That being so, the FCC has simply refused to allow petitioners to secure, by virtue of the fortuity of our remand, a second opportunity to comply with the exhaustion requirements embodied in section 405. The efficiency and fairness values served by exhaustion principles would be seriously compromised if agencies were obliged to furnish such second bites at the apple.[4]

Finally, it should go without saying that our decision in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C.Cir.1987) does not ordain a different exhaustion regime for constitutional claims. In *Meredith*, the FCC (consistent with its procedural rules) granted a motion for reconsideration raising a new constitutional argument. The Commission conceded that it viewed the constitutional objection as meritorious, but it decided, for its own reasons, to ignore the argument and proceed with its enforcement action. In that context, this court held that an agency could not ignore a *properly presented* constitutional claim advanced in an enforcement proceeding. *Id.* at 869-70. Here, in contrast, the FCC reasonably *declined* to address new arguments on remand.

---

[4] The same reasoning disposes of petitioners' contention that their constitutional and Cable Act claims are properly presented because the FCC has been afforded an "opportunity" to pass on these issues in a still-pending rulemaking proceeding. *Compare Great Falls Community TV Cable Company Co. v. FCC*, 416 F.2d 238, 239-40 (9th Cir. 1969) (exhaustion of administrative remedies futile where contrary agency position clarified by recently concluded rulemaking).

Third. Petitioners' Cable Act and "as applied" constitutional arguments run afoul of the doctrine of law of the case, which normally prevents a court from revisiting issues that have been expressly (and in some cases impliedly) resolved on a first appeal. 18 C. Wright & A. Miller, Federal Practice & Procedure, § 4478 (1981). One week prior to oral argument of their first appeal, petitioners attempted (via a supplemental brief) to raise the Cable Act and "as applied" constitutional arguments. The earlier panel rejected this contention, explaining that petitioners had failed to comply with section 405's exhaustion requirement. *NITCO I*, 825 F.2d at 1210-1211 n. 8. We also observed that the Cable Act argument represented a particularly poor candidate for first-time consideration on appeal because petitioners had actually argued before the Commission that the Cable Act did not apply to their case. *Id.* Especially in this horse-switching-in-midstream context, law of the case principles provide an additional basis for our determination not to consider petitioners' Cable Act and "as applied" constitutional contentions.[5]

* * * *

---

[5] Our ultimate conclusion that Cable Act claims are not properly presented dooms petitioners' argument that the Commission's divestiture order cannot be reconciled with *Eagle Telecommunications,*

In sum, the constitutional and Cable Act-based challenges to the cross-ownership rules are not properly before us. The Commission has, moreover, demonstrated that its orders are based on a reasonable interpretation of the cross-ownership regulations and the Commission's prior precedents. Accordingly, the petition for review is

Denied.

Inc., 54 Rad.Reg.2d 1124 (1983), *recons. granted*, 59 Rad.Reg.2d 1243 (1985). In that case, the Commission initially required Eagle to divest itself of cable facilities constructed in violation of the cross-ownership regulations. While review of the order was pending, however, the Cable Act became effective. Eagle then obtained relief from divestiture on the ground that its facilities came within the broadened rural exemption contained in the Cable Act. Petitioners urge that, under *Eagle*, the Cable Act must be applied to their case and that divestiture is inappropriate because the Cable Act has "overruled" the broad definition of the term "affiliate" in the cross-ownership regulations.

As alluded to previously, however, petitioners, by their own litigation strategy, have lost any claim to the protections of the Cable Act, and this includes Cable Act-based attacks on divestiture. We therefore need not address the intriguing question whether the Cable Act governs enforcement actions commenced before, but pending at the time of, its effective date. See 47 U.S.C. § 533(f) (Supp. 1986) (grandfathering clause of Cable Act's cross-ownership provisions); *Pipefitters Local Union v. United States*, 407 U.S. 385, 432-35, 92 S.Ct. 2247, 2272-74, 33 L.Ed.2d 11 (1972) (discussing the application, *vel non*, of the savings statute, 1 U.S.C. § 109 (1982), to prosecutions pending at the time of a change in the governing law). For the same reasons, we do not address petitioners' contention that the definition of affiliate in the cross-ownership rules is at odds with the Cable Act.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1521

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.
and NORTHWEST INDIANA CATV, INC.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

U.S. TELEPHONE ASSOCIATION, *et al.*,
Intervenors

Before: Wald, Chief Judge; and Robinson, Circuit Judge

ORDER

[Filed June 27, 1989]

Upon consideration of petitioners' Petition for Rehearing, filed May 26, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1521

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.
and NORTHWEST INDIANA CATV, INC.,
Petitioners
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

U.S. TELEPHONE ASSOCIATION, *et al.*,
Intervenors

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed June 27, 1989]

Petitioners' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1521

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.
and NORTHWEST INDIANA CATV, INC.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

U.S. TELEPHONE ASSOCIATION,
BELL ATLANTIC TELEPHONE COMPANY,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
U.S. CABLE TELEVISION ASSOCIATION, INC.,
U.S. CABLE OF NORTHERN INDIANA,
Intervenors

Petition for Review of an Order of the
Federal Communications Commission

Before: WALD, Chief Judge, and ROBINSON and STARR, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Communications Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is denied, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Wendy Jennis

/s/ Patricia Rislar

for CONSTANCE L. DUPRE
Clerk

Date: April 11, 1989

Opinion for the Court filed by Circuit Judge Starr.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. E-84-1

In the Matter of

COMARK CABLE FUND III, d/b/a
CCI CABLEVISION,
Complainant,

v.

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.,

and

NORTHWESTERN INDIANA CATV, INC., d/b/a
NORTHWEST INDIANA CABLEVISION,

successor to

RHYS MUSSMAN d/b/a
NORTHWESTERN INDIANA CABLEVISION,
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1988 Released: May 27, 1988

By the Commission:

1. Pending before the Commission is a remand order by the United States Court of Appeals for the District

of Columbia Circuit (the Court), decided July 31, 1987, in the subject proceeding.[1] The *Court's Order* requires the Commission to clarify our conclusion that Northwestern Indiana Telephone Company, Inc. (NITCO) and Northwestern Indiana CATV, Inc. (Northwest) violated our telephone/cable television cross-ownership rules.[2] This order constitutes the Commission's compliance with the Court's mandate.

I. BACKGROUND

A. *The Commission's Orders*

2. Our previous orders in this matter[3] required NITCO and Northwest (defendants) and Northwest's predecessor, Rhys Mussman d/b/a Northwestern Indiana Cablevision, to divest cable television distribution facilities constructed within NITCO's telephone service area without our prior approval. These *Orders* found defendants had committed substantial violations of section 63.54 of our Rules[4] and section 214(a) of the Communications

---

[1] Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987) (the *Court's Order*).

[2] 47 C.F.R. §§ 63.54-63.58.

[3] Comark Cable Fund III, 100 FCC 2d 1244, *recon. denied*, 103 FCC 2d 600, *conditionally stayed*, 104 FCC 2d 451 (1985) (*Orders*). The conditional stay was automatically terminated upon the refusal of the Court to issue a stay of our *Orders*. Northwestern Indiana Telephone Co. v. FCC, No. 85-1542 (D.C. Cir. July 11, 1986) (*per curiam*).

[4] 47 C.F.R. § 63.54 provides in pertinent part as follows:

> APPLICATIONS OF TELEPHONE COMMON CARRIERS TO CONSTRUCT AND/OR OPERATE CABLE TELEVISION CHANNEL FACILITIES IN THEIR TELEPHONE SERVICES AREAS
>
> § 63.54 Facilities for provision of video programming by a telephone common carrier in its telephone service area.
>
> (a) No telephone common carrier subject in whole or in part to the Communications Act of 1934 shall engage in the provision of video programming to the viewing public in its tele-

Act[5] based on, *inter alia*, our finding that such construction by NITCO had been on behalf of a cable television company which we found had been affiliated with NITCO. Defendants had been cautioned as early as April of 1984 that any further construction and operation of cable television facilities by Northwest within NITCO's telephone service area without prior Commission authorization would be at defendants' peril and render them subject to sanctions, including divestiture.[6] Nevertheless, defendants continued to construct and operate cable television facilities in three separate communities within NITCO's telephone service area without applying for or receiving the

---

> phone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.
>
> (b) No telephone common carrier subject in whole or in part to the Communications Act of 1934 shall provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provisions of video programming to the viewing public in the telephone service area of the telephone common carrier.
>
> Note 1: (a) As used above, the terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship.
>
> (b) Examples of situations in which a carrier and its customer will be deemed to be controlled or having a relationship include the following, among others: Where one is the debtor or creditor of the other (except with respect to chargs for communication services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other; and where any party has a financial interest in both. . . .

[5] 47 U.S.C. § 214(a). *See* note 38, *infra*.

[6] *See* 100 FCC 2d at 1253 n.37.

requisite FCC authorization pursuant to Part 63 of our Rules.[7]

B. *The Court's Order*

3. In its decision, the Court has remanded the proceeding to us for a further explanation in a relatively narrow area. It was concerned that our finding that defendants were affiliated might have been based in part on criteria that appeared inconsistent with our Rules and precedent. It concluded that further elucidation was necessary.[8] In this regard, the Court also found that the lease of pole space, by itself, to an unaffiliated cable operator was contemplated and permissible under our Rules.[9] Accordingly, the Court was troubled by language in our order denying reconsideration that appeared to suggest that the sole act of renting pole space converted the lessee into an affiliate of the lessor.[10] Further, in light of our decision in *The Chesapeake and Potomac Co.*, 57 Rad. Reg. 2d 1003 (1985) (*C & P*), the Court found that the boundaries of the "carrier-user" exception to our telephone/cable television cross-ownership prohibitions needed to be explained.[11] Lastly, the Court raised questions regarding our section 214 certification process. Because it is clear that a certificate would be required if NITCO and Northwest are found to be affiliated, the Court stated that if, on remand, the Commission determines the parties to be affiliated, the issue may not need to be further addressed.[12]

---

[7] Part 63 of our Rules, 47 C.F.R. § 63.01, *et seq.*, implements section 214 of the Act as well as our telephone/cable television cross-ownership policy decision, Section 214 Certificates, 21 FCC 2d 307 (1970), *aff'd sub nom.* General Telephone of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

[8] *Court's Order*, 824 F.2d at 1206-07, 1210.

[9] *Id.* at 1209.

[10] *Id.*

[11] *Id.* at 1210.

[12] *Id.* at 1210-11.

Accordingly, the case was remanded for an explanation of our conclusions in these limited respects.[13]

II. DISCUSSION

A. *The Affiliation Standard Under Section 63.54*

4. Section 63.54(a) precludes a telephone common carrier from engaging in cable television service in its telephone service area through an affiliate. The first note to section 63.54 states that the term "affiliate" bars any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship."[14] Section 63.54(b) precludes a telephone common carrier from providing space on its poles to an affiliate engaged in the business of providing cable television service.

5. In the instant proceeding, we made a determination of affiliation based on all of the facts of record taken together. Specifically, we listed numerous "transactions" which indicated such an affiliation existed. In our order denying reconsideration, we reiterated four of the transactions emphasized in our original decision and added three more to the list, including NITCO's lease of telephone pole space to Northwest. Although, as noted by the Court, our first opinion based the determination of affiliation on all of the facts taken together, the opinion denying reconsideration stated that "each of [the seven listed relationships] was and continues to be prohibited by Section 63.54." 103 FCC 2d at 602. This statement

---

[13] Although the Court's mandate appeared to vacate our previous *Orders*, the Court granted our request for clarification of the mandate to make clear that no vacation of our *Orders* was contemplated by the Court, and amended the mandate accordingly. Northwestern Indiana Telephone Co. v. FCC, No. 85-1542 (D.C. Cir. Nov. 17, 1987).

[14] 47 C.F.R. § 63.54 n.1(a).

requires elucidation. It was not our intention to state that the NITCO pole leases to Northwest or Rhys Mussman are by themselves prohibited under section 63.54(a) or that the simple leasing of pole space constitutes indicia of an affiliation. Rather, we intended to conclude that the lease of pole space was a prohibited relationship solely because of our finding of affiliation for other reasons.[15] In order to clarify our position in this regard, we will briefly summarize the evidence upon which we determined that a prohibited affiliation existed.

6. As the Court noted, these transactions included: Robert Mussman's lease of office space to Northwest; NITCO's sublease of land used as the site of Northwest's antennas and other cable equipment;[16] a paid consulting agreement between Rhys Mussman and NITCO; Robert Mussman's personal guarantee of $450,000 in bank loans made to Northwest; Robert Mussman's personal guarantee of Rhys Mussman's agreement to indemnify one of the localities served by Northwest against costs arising from litigation involving Northwest; and Northwest's use of NITCO's post office box and mailing address;[17] and the particular oral private contractual agreements between defendants for construction and maintenance with respect to Northwest's cable systems in three Indiana communities.[18]

7. In addition to these clear indicia that an "affiliation" existed between the two companies, the record in-

---

[15] *See, e.g.*, our *Orders*, 100 FCC 2d at 1251, 103 FCC 2d 613 at n.29, and para. 11, *infra.*

[16] Robert Mussman now directly leases such property to Northwest. It appears that Northwest also proposed to locate a microwave radio receive site on property owned by or leased to NITCO directly behind its DeMotte central office. *See Orders*, 103 FCC 2d at 606 n.13.

[17] *Court's Order*, 824 F.2d at 1207.

[18] *See Orders*, 103 FCC 2d at 602-03.

dicates other transactions and courses of dealings which support this conclusion. For example: a salaried employee of the telephone company (the Executive Vice President) was simultaneously doing business as an individual proprietorship) as the cable company,[19] that same employee was responsible for negotiating pole attachment agreements on behalf of the telephone company with cable companies with which he was competing for cable franchises in communities within the telephone company's service area;[20] all contractual arrangements between the companies, involving hundreds of thousands of dollars, were oral;[21] an oral consulting arrangement between the telephone company and the chief executive officer of the cable company was not reduced to writing;[22] and the cable company's CEO represented to city franchising officials that he was the Executive Vice President of his father's telephone company and further represented[23] that his father was Secretary-Treasury of his cable company.[24] For all these reasons, we confirm and clarify our earlier view that an affiliation did exist, independent of the fact that the cable company leased pole space from the telephone company.

8. We now turn to the question whether the transactions are exempt because they fall within the carrier-

---

[19] *Id.*, 100 FCC 2d at 1251.

[20] *Id.*, 103 FCC 2d at 612.

[21] Some of the agreements, although not all, were reduced to writing only after a formal complaint had been filed. *Id.*, 100 FCC 2d at 1248. The fact that the contracts were oral, rather than written, is an important indication that the relationships were not the sort of arms-length transactions that can be expected of truly independent entities.

[22] *Id.*

[23] The defendants admit that this representation was made, but they claim that it was false.

[24] *Id.*, 100 FCC 2d at 1251.

user relationship. The Court said that, in light of *C & P* and *Ohio Bell Telephone Co.,* 1 FCC Rcd 942 (1986) (*Ohio Bell*), it could not clearly determine the boundaries of the carrier-user exception.[25] We therefore take this opportunity to clarify our position in this regard. Under existing law, an essential element of common carriage is an entity's holding itself out to serve all customers indiscriminately.[26] The key to the carrier-user exemption is whether the carrier is providing facilities as part of its services as a common carrier and whether such services are generally available. Thus, the "carrier-user relationship" exception to section 63.54 of our Rules contemplates transactions that entail a general offer to provide on an indiscriminate basis substantially the same service or services to any and all similarly-situated companies or members of the public.

9. In *C&P,* we authorized the carrier to construct and maintain channel distribution facilities for use by a franchised cable television customer pursuant to a proposed arrangement which would allow the cable customer to enjoy attributes of ownership in the facilities although legal title would be retained by the carrier. The *Ohio Bell* decision authorized a carrier's proposal to construct and maintain channel distribution facilities which (except for the "hub" portions physically located on the carrier's premises) were to be sold to the cable customer. The cable customer would be obligated to make periodic payments for maintenance of the lines and use of the "hub" facilities. In both the *C&P* and *Ohio Bell* cases, the construction and maintenance of the cable distribution facilities were available generally to the public. That

---

[25] *Court's Order,* 824 F.2d at 1210.

[26] National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied,* 425 U.S. 999 (1976). *See also* Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1255-57 (1982), *aff'd sub nom.* Wold Communications v. F.C.C., 735 F.2d 1468 (D.C. Cir. 1984).

fact was critical to our determination, in each of these cases, that the "carrier-user relationship" applied.

10. Here, in contrast, neither NITCO nor Northwest ever even argued that they had, or ever contemplated having, a common carrier-user relationship and indeed it is apparent that they had no such relationship. Their position has always been that NITCO's relationship with Northwest was not as a common carrier but rather as a private contractor. Their conduct supports this. Unlike the carriers in *C & P* and *Ohio Bell*, NITCO did not hold itself out to others under comparable terms and conditions. To the contrary, competitors or potential competitors of Northwest did not have the opportunity to enter into similar agreements with NITCO on terms and conditions that would not be discriminatory or otherwise inconsistent with the regulatory regime of sections 201 through 205 of the Act. In fact, Northwest faced a competing cable television company that was operating in the area, which had not been offered the same arrangement provided to Northwest.[27] Thus, the relationship fostered by NITCO was not an indifferent holding out of service required for coverage under the carrier-user relationship.[28]

---

[27] *Orders*, 103 FCC 2d at 611. Indeed, NITCO did not offer arrangements to a competitor of Northwest on the same oral terms and conditions extended to Northwest. Such conduct raised serious anticompetitive concerns because Rhys Mussman, the person responsible for negotiating pole attachment agreements on behalf of NITCO, was himself planning to lease space on NITCO's poles and to construct Northwest's cable television systems in the same communities.

[28] Even though only one company had been awarded a franchise or authority to engage in cable television operations in the District of Columbia in *C&P* and in Cleveland in *Ohio Bell*, the carriers were obligated to indiscriminately hold themselves out to serve all similarly-situated customers under the same terms and conditions of service. If more than one cable company is franchised in the service areas of those cases, the Communications Act would require

11. This proceeding is distinguishable from *C & P* for additional reasons. Unlike *C & P*, where the telephone and cable companies were independent entities before they entered into the proposed tariff services there involved, as explained above, the two companies here were affiliated independently of the pole leasing arrangements.[29] Rhys Mussman simultaneously wore both his telephone company and his cable company hats. As Executive Vice President of NITCO, he had responsibility for negotiating agreements with cable television companies seeking to lease space on NITCO's poles. As Rhys Mussman d/b/a Northwestern Indiana Cablevision, he sought authority to construct cable systems in two Indiana communities where a competing cable operator also was seeking such authority and to lease space on NITCO's poles in those communities. His father, the president, chairman and majority stockholder of NITCO, also was directly involved in his son's cable venture by guaranteeing financial and legal obligations of Rhys' cable company.[30]

---

the telephone companies to permit those other cable companies to obtain those carriers' services.

[29] Here, we are concerned about the anticompetitive impact of Rhys Mussman negotiating with a competing cable company for pole space on behalf of the telephone company at the same time he was seeking franchises for his own cable systems. *Orders*, 103 FCC 2d at 611-612.

[30] The Court asked for an explanation why, in light of the finding in *C & P* that the proposed transfer of certain attributes of ownership in channel distribution facilities to the cable company fell within the carrier-user exception, "transfer of ownership rights *in toto*—as occurred in the present case—is treated differently." 824 F.2d at 1210 (footnote omitted). As clarified above, the availability of the carrier-user exception in a particular situation depends on whether there is an indifferent holding out, and not on whether a telephone company leases or sells the facilities that it proposes to construct for use by a cable television operator. What distinguishes the instant case from *C&P* and *Ohio Bell* is that in those cases the telephone company and the cable company did have

12. In sum, unlike other cases involving a carrier's public holding out to construct and maintain cable television distribution facilities on a nondiscriminatory basis,[31] NITCO made no such indifferent holding out to other cable television entrepreneurs. It is NITCO's failure to deal with Northwest on common carrier terms that causes us to conclude that there was no carrier-user relationship. Because of undisputed direct and indirect financial and business relationships between defendants determined on the record, quite apart from their pole attachment lease arrangements, *we concluded that defendants were affiliated companies within the meaning of our rules and that divestiture of the unlawfully constructed cable facilities was warranted under all of the circumstances.* In addition, for the reasons stated above, we find that the defendants' relationship did not fall within the carrier-user exception. Accordingly, *C&P* and *Ohio Bell* are not controlling in this case.

B. *The Necessity for Section 214 Certification*

13. The final issue before us is whether NITCO violated section 214 of the Act by constructing cable television distribution facilities for Northwest. NITCO contends that section 214 does not apply to it because it has engaged in interstate communication only as a "connecting carrier," *i.e.*, solely through physical connection with the facilities of another common carrier, and therefore is not subject to section 214. In adopting our cross-

---

a carrier-user relationship for which there is an explicit exemption from the cross-ownership bar in section 63.54(a). *See* para. 9, *supra*.

[31] *See, e.g., C&P*, 57 Rad. Reg. 2d at 1006 and 1008 (even though the District of Columbia decided to authorize only one cable operator, the carrier was willing to provide equivalent facilities to others on like terms, made similar offers to others as it had to the city's franchisee, and also complied with our rules relating to the availability of pole space); The Chesapeake and Potomac Telephone Company Tariff F.C.C. No. 10, effective October 1, 1986 (public offering of broadband transport facilities).

ownership rules, we stated that cable television service offered by an affiliate of a telephone company would be considered to be cable television operations by the telephone company "without any further necessity of piercing the corporate veil" to show that the companies were under common control.[32] Thus, when NITCO constructed cable lines to be used by its affiliate, Northwest, for transmitting off-the-air broadcast television signals, which is interstate communication under section 2(a) of the Act, defendants became engaged in interstate communication in a manner other than "solely through physical connection with the facilities of another carrier. . . ." and thus no longer remained a "connecting carrier" that is exempt from section 214(a) of the Act under section 2(b)(2) of the Act.[33]

14. With respect to interstate lines *outside* of carrier's exchange telephone service area, we have granted exchange telephone companies blanket section 214 authority to construct lines for their cable television services, their noncommon carrier services, or when the lines are to be sold to an unaffiliated party.[34] We similarly have granted blanket section 214 authority to construct interstate lines to nondominant carriers.[35] However, NITCO, as a local

---

[32] Section 214 Certificates, 22 FCC 2d at 751 (1970). *See Orders*, 100 FCC 2d at 1255; 103 FCC 2d at 611, n.24.

[33] *See* 47 U.S.C. §§ 153(u), 152(b)(2).

[34] Section 63.08(a) of our Rules provides as follows:

> An exchange telephone common carrier or its affiliate is not required to file for authority pursuant to 47 U.S.C. 214 and 47 C.F.R. 63.10 to provide lines, or for existing lines, *outside* of the exchange telephone service area of that carrier and any of its affiliates when the lines are (i) for its own cable television service; (ii) for its noncommon carrier services; or (iii) sold to an unaffiliated party. "Affiliate" is defined as in 47 C.F.R. 63.54. (emphasis added)

[35] Section 63.08(b) of our Rules provides as follows:

> (b) If a nondominant common carrier and its affiliates are not affiliated with an exchange telephone common carrier, the

exchange telephone carrier, is a dominant carrier and thus was not exempt under section 63.08(b) from the need to file for and obtain prior section 214 authorization to construct cable television lines within its local telephone service area.[36]

15. In view of the foregoing discussion, because defendants do not deny that they would have been required to file for authorization pursuant to section 214 of the Act and section 63.54 of our Rules if they are properly determined to have been affiliates,[37] it is not necessary to reach the issue whether NITCO would have needed a section 214 certificate[38] if defendants were not

---

> nondominant carrier or its affiliate is not required to file for authority pursuant to 47 U.S.C. 214 and 47 C.F.R. 63.01 to provide lines, or for existing lines, of the types described in paragraph (a) of this section between any domestic points. "Affiliate" is defined as in 47 C.F.R. 63.54 and "nondominant" is defined as in 47 C.F.R. 61.15a [sic].

The reference to the definition of "nondominant" should be to 47 C.F.R. 61.12(e).

[36] We have determined that franchised exchange telephone companies possess control of essential facilities and will continue to be treated as dominant carriers for regulatory purposes. Competitive Common Carrier Rule Making, 85 FCC 2d 1, 11, 23-24 (1980). *See also* 47 C.F.R. § 61.12(c) where a dominant carrier is defined as a carrier found by the Commission to have market power (*i.e.*, power to control prices).

[37] *See, e.g.*, Letter from Russell D. Lukas to Chief, Common Carrier Bureau, at 2 (Feb. 7, 1986) (reproduced at Appendix to the Commission's Motion for Expedited Consideration of Emergency Motion for Stay filed with the Court on July 11, 1986, at 16); 47 C.F.R. § 63.54 at note 1(a). Another distinguishing factor between the instant case and *C&P* and *Ohio Bell* was defendants' failure to file an appropriate section 214 application or request for waiver, which would have served as a vehicle for examining NITCO's involvement in Rhys Mussman's cable television operations and as a means of ensuring compliance with the Act and our policies under Part 63 of the Rules. *See* note 39, *infra*.

[38] Section 214(a) provides, in pertinent part, that:

> [n]o carrier shall undertake the construction of a new line or of an extension of any line . . . unless and until there shall

affiliates within the meaning of our telephone/cable television cross-ownership rules.[39]

16. Accordingly, IT IS ORDERED that the findings and conclusions in our *Orders*, as further explained and clarified herein, ARE HEREBY REAFFIRMED.[40]

FEDERAL COMMUNICATIONS COMMISSION

H. WALKER FEASTER III
Acting Secretary

> first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such additional or extended line. . . . As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels. . . .

[39] *See Court's Order*, 824 F.2d at 1211. As previously noted (*see* note 7, *supra*), Part 63 of our Rules implements not only section 214(a) of the Act, but also our telephone/cable television cross-ownership policies and rules. NITCO's failure to file the required application pursuant to section 214(a) precluded not only the timely exercise of our statutory right and obligation to pass upon a carrier's construction of interstate lines, but also deprived us of the vehicle by which we examine whether proposed construction by a telephone company of cable television facilities within its telephone service area would comply with our cross-ownership rules and policies. It was only after a competitor of Northwest filed a complaint alleging that defendants were violating sections 214(a) and 202(a) of the Act and section 63.54 of our Rules that we became aware of NITCO's unauthorized construction of interstate lines within its telephone service area.

[40] We have not addressed defendants' pleading entitled "Petition to Terminate Proceedings" (filed September 4, 1987). The *Court's Order* did not require us to reopen the record to accept additional comments or argument. *Court's Order*, 824 F.2d at 1210 n.8. Rather, the Court merely remanded the case for the limited purposes discussed herein. We find that defendants' attempt to inject new arguments at this late date as well as reargue positions already fully considered before the record was closed would not be in the public interest.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-1542

NORTHWESTERN INDIANA TELEPHONE
COMPANY, INC., *et al.*,
Appellants,
v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

Argued March 19, 1987

Decided July 31, 1987

Petition for Review of an Order of the
Federal Communications Commission

Russell D. Lukas, with whom David L. Nace and Theresa Fenelon, Washington, D.C., were on brief, for appellants. Pamela L. Gist, Washington, D.C., also entered an appearance for appellants.

Nancy E. Stanley, Counsel, F.C.C., with whom Jack D. Smith, Gen. Counsel, Daniel M. Armstrong, Associate Gen. Counsel and C. Grey Pash, Jr., Counsel, F.C.C., Catherine G. O'Sullivan and Marion L. Jetton, Attys., Dept. of Justice, Washington, D.C., were on the brief, for appellee. Gerald E. Goldstein, Counsel, F.C.C., Washington, D.C., also entered an appearance for appellee.

Before BORK and SILBERMAN, Circuit Judges, and FRIEDMAN,* Circuit Judge, United States Court of Appeals for the Federal Circuit.

Opinion for the Court filed by Circuit Judge SILBERMAN.

SILBERMAN, Circuit Judge:

This case involves a dispute between the Federal Communications Commission ("FCC"), a telephone company in Indiana owned by an individual named Robert Mussman, and a cable television company owned and managed by Robert Mussman's son Rhys. Northwestern Indiana Telephone Company ("NITCO"), and Northwest Indiana CATV, Inc. ("Northwest"), the cable company, petition this court to review decisions by the FCC holding that the two companies violated the agency's telephone/cable cross-ownership rules, 47 C.F.R. § 63.54 (1986), as well as section 214(a) of the Communications Act of 1934, 47 U.S.C. § 214(a) (1982). The FCC decided that NITCO and Northwest were "affiliates," making NITCO's agreement to construct cable television facilities for Northwest in its telephone service area, and NITCO's lease of telephone pole space to Northwest, violations of the Commission's rules. The FCC also held that NITCO violated the statute by failing to obtain certification from the Commission before constructing the cable television facilities for Northwest. Because the Commission's finding of "affiliation" was based in part on criteria that appear inconsistent with the Commission's own rules and precedent, we remand the case for further explanation.

I.

A cable television operator transmits signals to customers by way of coaxial cable. The cable operator first collects the signals from the airwaves with an antenna or microwave receiver, amplifies and converts them using a "headend" device, and then sends them along a branching series of distribution cables until they ultimately reach the homes of individual subscribers. A cable operator usually gains access to the required distribution cables in one of three ways. The most expensive option is for the cable operator to build its own facilities. Alternatively, it can lease space on existing telephone poles and string its own cables along the poles. Or the telephone company can itself install, own and operate the cables and transmit signals for the cable operator by offering a "channel distribution" service. *See General Tel. Co. of California v. FCC*, 413 F.2d 390, 393 (D.C.Cir.), *cert. denied*, 396 U.S. 888, 90 S.Ct. 173, 24 L.Ed.2d 163 (1969). Northwest, the cable operator in this case, chose what appears to be a combination of the second and third options: although Northwest owns the facilities, NITCO, the local telephone company, not only leased space on its poles, but actually installed the cable lines as well.

---

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

A competitor of Northwest complained to the FCC in 1983 that NITCO and Northwest were engaged in conduct prohibited by the Commission's rules governing affiliations between telephone companies and cable operators, and contended that NITCO had improperly constructed the cable facilities for Northwest without obtaining a certificate from the Commission. In response, NITCO and Northwest denied that a certificate was required, and also denied any affiliation. NITCO and Northwest did acknowledge, however, a number of past and current business relations between the two companies (or their principals) in addition to the lease of pole space and construction of the cable facilities. These transactions included: Robert Mussman's lease of office space to Northwest; NITCO's lease of land used as the site of Northwest's antennas and other cable equipment; a paid consulting agreement between Rhys Mussman and NITCO;

Robert Mussman's personal guarantee of $450,000 in bank loans made to Northwest, and of Rhys' agreement to indemnify one of the localities served by Northwest against costs arising from litigation involving Northwest; and Northwest's use of NITCO's post office box and mailing address. The two companies also admitted that Rhys had (falsely) represented to various town officials that Robert Mussman was an officer of Northwest.

In an opinion released on March 18, 1985, the Commission determined that NITCO and Northwest were affiliates within the meaning of the FCC's telephone/cable cross-ownership rules. *See Comark Cable Fund III*, 100 F.C.C.2d 1244 (1985). These rules prohibit a telephone company from furnishing cable television to the public in the telephone company's telephone service area, either directly, or indirectly through an affiliated cable company, including renting pole space to an affiliate. 47 C.F.R. § 63.54.[1] Note 1(a) to the rules defines the term "affiliate" as including "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship." The Commission stated that five of the interconnections NITCO and Northwest had admitted—the loan guaranty; the guaranty of the indemnification agreement; the consulting contract; the public representations as to Robert Mussman's role in Northwest; and *the agreements to construct Northwest's cable television systems*—"together with all the other facts set forth" in the decision led to the conclusion that NITCO and Northwest were affiliates. 100 F.C.C.2d at 1253. Because Northwest was an affiliate, NITCO had violated the FCC rules by leasing pole space to Northwest and by constructing and maintaining the three cable television systems for Northwest. The Commission also decided that NITCO had not legally constructed cable facilities for the transmission of broadcast television signals since it lacked a certificate required by 47 U.S.C. § 214(a),[2] and therefore ordered NITCO to terminate all affiliations with Northwest and to divest all the cable facilities.

---

[1] The cross-ownership rules are as follows:

> (a) No telephone common carrier . . . shall engage in the furnishing of cable television service to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.
>
> (b) No telephone common carrier . . . shall provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provision of cable television services to the viewing public in the telephone service area of the telephone common carrier.

47 C.F.R. § 63.54 (1986).

NITCO asked the Commission to reconsider, arguing, *inter alia*, that the FCC's reasoning was inconsistent with a FCC opinion, released only weeks earlier, in which the Commission authorized a telephone company to construct channel distribution facilities to be partially owned by a cable operator without finding that the transaction created an affiliation under Note 1(a) of the cross-ownership rules. *See The Chesapeake and Potomac Telephone Co.*, 57 Rad.Reg.2d 1003 (1985) (*"C & P"*). The

---

[2] Section 214(a) reads:

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. . . . [T]he term "line" means any channel of communication established by the use of appropriate equipment. . . .

47 U.S.C. § 214(a) (1982).

Commission denied reconsideration, explaining that unlike the present case the C & P transaction "involved a 'carrier-user relationship' within the meaning of the sole exception to the broad language in Note 1(a)." *Comark Cable Fund III*, 103 F.C.C.2d 600, 609 (1985). The FCC reiterated four of the five relationships emphasized in the first decision (but not Rhys Mussman's public statements) and added three more to the list: the lease of office space to Northwest; the lease of land for Northwest's cable equipment; and *NITCO's lease of telephone pole space to Northwest.* Although the FCC's first opinion had based the determination of affiliation on "all of the . . . facts" taken together, the opinion denying reconsideration stated that "each of [the seven listed relationships] was and continues to be prohibited by Section 63.54," suggesting that any one of the relationships alone would create an affiliation. 103 F.C.C.2d at 602.[3]

NITCO and Northwest thereafter filed their petition for review in this court and, while the petition was pending, requested that the Commission stay its order. The Commission subsequently issued a third opinion, granting the stay but conditioning it on terms that NITCO and Northwest declined to accept.

II.

The FCC's telephone/cable company cross-ownership rules define "affiliate" in sweeping terms, covering, as we have noted, telephone companies and cable operators that have "any financial or business relationship whatsoever." 47 C.F.R. § 63.54 Note 1(a). The rules contain an exception, however, for the "carrier-user relationship," which apparently refers to the offerings of a common carrier. NITCO and Northwest argue that this "carrier-user" exception is ill-defined and has been interpreted inconsistently by the FCC to authorize certain relationships between favored applicants but prohibit similar relationships between others. In the present case, petitioners argue, several of the transactions between NITCO and Northwest listed by the Commission are almost identical to transactions that fell within the "carrier-user" exception in C & P and other cases. Although an agency's reasonable interpretation of its own rules is normally due deference, *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), we agree, in light of C & P, that the Commission's treatment of at least two of those transactions—NITCO's lease of telephone space to Northwest, and NITCO's agreement to construct and maintain Northwest's cable facilities—is in need of further explanation.[4]

---

[3] The FCC's brief before this court adheres to the approach of the first opinion, stating "[I]t was reasonable for the Commission to conclude that *the overall picture* presented by all of its factual findings warranted a determination" that NITCO and Northwest were affiliates. Brief of Respondents at 33 (emphasis added).

The Commission's claim that NITCO's lease of pole space to Northwest supports a finding of affiliation between the companies is on its face inconsistent with the very language of the cross-ownership rules. Section 63.54(b) of the rules prohibits a telephone company from renting telephone pole space to an affiliated cable operator. It obviously follows that a telephone company can offer pole space to a cable operator that is unaffiliated. Indeed, a different section of the rules actually *requires* a telephone company to lease pole space under certain circumstances. *See* 47 C.F.R. § 63.57. If renting pole space converts the lessee into an affiliate of the lessor, as the Commission's opinion suggests, a telephone company would be prohibited by the rules from ever renting pole space to any cable company at all. We simply cannot understand, then, how the lease of pole space by itself could be evidence of affiliation.

---

[4] In addition to their contention that the FCC has interpreted the "carrier-user" exception inconsistently, NITCO and Northwest also argue that the cross-ownership rules are so unclear as to not give adequate prior notice of the standards by which telephone and cable companies are expected to guide their conduct. The relations at issue in this case, however, were initiated long before the release of C & P in January, 1985, and prior to C & P the cross-ownership rules appeared less uncertain. Although the Commission had never issued a decision (of which we are aware) explicitly interpreting the "carrier-user" exception, we do not see how petitioners could reasonably have believed that *all* of their interconnections fell within that exception.

The significance of NITCO's construction of cable facilities for Northwest is more uncertain. We start with the undisputed proposition that a telephone company may construct, maintain and own channel distribution facilities and use them to transmit television signals for *independent* cable operators without running afoul of the Commission's cross-ownership rules.[5] That is so because early in the history of cable television regulation the Commission decided that a telephone company undertakes only a common carrier service when it transmits, using its own facilities, television signals for cable operators. *See Common Carrier Tariffs for CATV Systems*, 4 F.C.C.2d 257, 260 (1966). *See also General Tel. Co. of California*, 13 F.C.C.2d 448, 454, *reconsid. denied*, 14 F.C.C.2d 170 (1968), *aff'd*, 413 F.2d 390, *cert. denied*, 396 U.S. 888, 90 S.Ct. 173, 24 L.Ed.2d 163 (1969). The Commission thus treats a channel distribution service as falling within the "carrier-user" exception to the Note 1(a) definition of affiliate.

---

[5] *See* 47 C.F.R. § 63.54(b) (barring telephone companies from providing "channels of communication" to affiliated cable operators —but not all cable operators). *See also* 47 C.F.R. § 63.57 (telephone companies may "construct and/or operate distribution facilities for channel service to . . . independent cable systems" if the cable operators are first given the option of renting pole space); *Eagle Telecommunications, Inc.*, 54 Rad.Reg.2d 1124, 1126 n. 3 (1983), *reconsid. granted*, 59 Rad.Reg.2d 1243 (1985) ("[T]he ban [in section 63.54(a)] is against the carrier furnishing programming. The carrier may construct cable television facilities within its telephone service are and offer them under tariff to another who would provide service to customers").

But judging from the Commission's recent decision in C & P, the carrier-user exception is evidently not limited to the provision of channel distribution services. In that case, the telephone company, C & P, proposed to construct and maintain channel distribution facilities on telephone pole space leased by a cable operator, and to retain legal title to the facilities. The otherwise unaffiliated cable operator agreed to pay C & P for the cost of construction (over a period of four years), assume some of the risks and benefits of ownership, and use the transmission system for substantially all of its useful life. The Commission approved the transaction, explaining that "[d]espite the broad language of [Note 1(a)] we do not believe that it prohibits C & P, the title owner of the facilities, from granting to [the cable operator] the tax benefits or other economic risks and benefits of ownership. C & P has no *control* over the cable provider or the cable service nor is there any common control over the two companies." 57 Rad.Reg.2d 1003, 1008 (1985) (emphasis added). In the present case—but not in *C & P* itself—the Commission described all aspects of the C & P/cable operator relationship as covered by the "carrier-user" exception to Note 1(a), because the transactions "involved a proposed tariff offering comparable to traditional common carrier tariffed channel service offerings." 103 F.C.C.2d at 610 n. 21. Here is our difficulty: in light of *C & P*, the boundaries of the "carrier-user" exception are not clear. The transaction in *C & P* included the transfer of certain attributes of ownership in channel distribution facilities, but nevertheless fell within the "carrier-user" exception. The Commission has not adequately explained why a transfer of ownership rights *in toto*—as occurred in the present case—is treated differently.[6]

---

[6] *The Ohio Bell Tel. Co.*, 1 FCC Rcd. 942 (1986), issued subsequent to the final decision in this case, supports our impression

To be sure, the Commission cited factors other than the telephone pole leases and the construction agreements as evidence of affiliation between NITCO and Northwest. If it were apparent from the Commission's opinions that these other factors created an affiliation without regard to the lease and construction agreements, and that the divestiture remedy would have been selected on the basis of those other factors standing alone, we would review that determination without remanding.[7] But the Commission's opinions are not so clear. *See supra* p. 1208 and n.3. Since we are reviewing an administrative agency, and not a district court, we cannot affirm on grounds other than those presented by the Commission itself. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). We therefore, un-

---

that the "carrier-user" exception has been considerably expanded. In *Ohio Bell*, the Commission approved a telephone company's proposal to construct and maintain channel distribution facilities which (except for the "hub" portions physically located in the telephone company's offices) were to be sold outright to the cable operator. The cable operator apparently agreed to make a one-time payment to the telephone company for the cable lines and periodic payments (at a rate filed with the Commission under tariff) for maintenance of the lines and use of the "hub" facility. In response to an argument that the transaction violated the cross-ownership rules, the Commission stated only that "[t]he proposal does not materially differ from what other carriers have been authorized to construct. *See, e.g., C & P.*" 1 FCC Rcd. at 944. In a footnote to the decision, the Commission distinguished the present case by noting that here NITCO and Northwest had been deemed affiliates "as a result of one person owning the telephone company and providing guaranteed repayment of loans to his son's cable television company." *Id.* at 942 n. 4. *Ohio Bell* might then suggest that the Commission no longer believes that a telephone company creates an affiliation with a cable operator merely by constructing distribution facilities that are to be owned by the cable operator (if that was ever the Commission's real position).

[7] It may well be that only sloppy draftsmanship is to blame for the apparent inconsistencies in the Commission's decisions—but we cannot very well assume that.

fortunately, must prolong this dispute by remanding the case on this ground.[8]

As we noted above, NITCO built three cable television systems, each of which was to be owned and operated by Northwest. NITCO did not obtain a section 214 certificate from the Commission, and the FCC decided that NITCO was prohibited from constructing the channel distribution facilities without such authorization. Although the Commission's brief maintains that NITCO would have needed a section 214 certificate even if Northwest had not been an "affiliate" (the Commission's position on this issue during the proceedings below was somewhat unclear), FCC counsel acknowledges a lack of precedent for this interpretation. Since all parties agree that a certificate would be required if NITCO and Northwestern are properly determined to be affiliated, we think it prudent to reserve judgment on this novel question. If on remand the FCC finds NITCO and Northwest to be affiliated we may not have to reach the issue.

---

[8] NITCO and Northwest present two arguments challenging the validity of the Commission's 1970 telephone/cable cross-ownership rules upon which the Commission was never given an "opportunity to pass," and that we therefore cannot entertain. *See* 47 U.S.C. § 405 (1982); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983). First, in a supplemental brief submitted one week before oral argument, petitioners argue that the definition of "affiliate" in the rules violates the free speech protections of the First Amendment. But merely because petitioners' argument is constitutionally based does not, when the challange is to an agency policy or regulation, entitle a party to bypass statutory exhaustion requirements. *See Meredith Corp. v. FCC*, 809 F.2d 863, 872-74 (D.C. Cir. 1987). Second, petitioners argue that the Commission's definition of affiliate is inconsistent with section 613(b) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b) (Supp. III 1985). Petitioners claim this second argument was "squarely raised" before the FCC in a submission made on November 8, 1985 in connection with their September 16, 1985 petition for stay. J.A. 1840. We disagree. To be sure, petitioners did point out that they were not affiliates under a separate definition found in the Act, but instead of arguing that the Commission was bound to apply the statutory definition, petitioners actually suggested that the Act did not even apply to this case because of the date it was enacted.

NITCO's and Northwest's final argument is that the Due Process clause of the Fifth Amendment guarantees them an evidentiary hearing before they can be deprived of property by order of the Commission. We disagree. There can be no question that NITCO and Northwest each received notice of the specific charges in the proceedings below and each responded in writing on numerous occasions. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985). Moreover, the Commission explained that it viewed the evidence of affiliation in the light most favorable to petitioners. There was thus no material factual dispute before the agency, but rather, only disagreement as to the legal conclusions to be drawn from the version of the facts provided by petitioners. Due Process does not require a trial-type hearing under these circumstances. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 231-32 (D.C.Cir. 1981).

This case is remanded for proceedings consistent with our opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1542

NORTHWESTERN INDIANA TELEPHONE COMPANY,
INC., *et al.*,
Appellants
v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

Petition for Review of Orders of the
Federal Communications Commission

Before: BORK and SILBERMAN, Circuit Judges, and FRIEDMAN *, Circuit Judge, U.S. Court of Appeals for the Federal Circuit.

JUDGMENT

This cause came on to be heard on the petition for review of certain orders of the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders on review herein are vacated and this case is remanded to respondent Commission for further proceedings, all in accordance with the Opinion for the Court filed herein this date.

---

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: July 31, 1987

Opinion for the Court filed by Circuit Judge Silberman.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1542

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC., *et al.*

v.

FEDERAL COMMUNICATIONS COMMISSION

Before: BORK and SILBERMAN, Circuit Judges, and FRIEDMAN *, Circuit Judge, U.S. Court of Appeals for the Federal Circuit.

ORDER

[Filed November 17, 1987]

Upon consideration of the motion of the Federal Communications Commission for clarification of judgment, the response thereto and of the reply, it is

ORDERED, by the Court, that the motion is granted and this Court's judgment of July 31, 1987 is amended as follows:

> In the second paragraph, beginning at line 1 and ending at line 2, delete the words
>
> > the orders on review herein are vacated and

The Clerk is directed to transmit a certified copy of this order to the Federal Communications Commission for inclusion in the mandate of the Court previously issued.

---

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. E-84-1

IN THE MATTER OF

COMARK CABLE FUND III, d/b/a
CCI CABLEVISION,
Complainant

v.

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.

and

NORTHWEST INDIANA CATV, INC. d/b/a
NORTHWESTERN INDIANA CABLEVISION,

successor to

RHYS MUSSMAN d/b/a
NORTHWESTERN INDIANA CABLEVISION,
Defendants

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 1985; Released: December 9, 1985

BY THE COMMISSION: COMMISSIONER PATRICK DISSENTING IN PART AND ISSUING A STATEMENT.

1. Before the Commission for consideration is a "Petition for Stay Pendente Lite" ("Petition") filed on September 16, 1985 jointly by Northwestern Indiana

Telephone Company, Inc. ("NITCO") and Northwest Indiana CATV, Inc. ("Northwest Cable"), (referred to jointly hereinafter as "Defendants"). Defendants seek a stay of our order in *Comark Cable Fund III*, 100 *FCC* 2d 1244 ("Order"), *reconsideration denied, Memorandum Opinion and Order*, FCC 85-475, released August 23, 1985, *appeal docketed*, No. 85-1542, D.C. Cir., August 29, 1985 (*"Reconsideration Order"*) in the above-captioned proceeding.[1]

Background

2. The instant proceeding was initiated on October 12, 1983 when CCI filed a complaint, pursuant to Section 208 of the Communications Act, against NITCO and Northwest Cable's predecessor, Rhys Mussman d/b/a Northwestern Indiana CableVision. The gravamen of CCI's complaint was that Defendants were affiliated companies engaged in discriminatory and anticompetitive conduct in violation of the Act and our telephone/cable television cross-ownership rules. More particularly, CCI alleged, *inter alia*, that NITCO was constructing and operating a cable television system in Hebron and constructing a cable television system in DeMotte, Indiana,

---

[1] Also before us is a petition for leave to file an opposition to the Petition, filed by Comark Cable Fund III d/b/a a Cablevision ("CCI") on September 26, 1985. Comments filed by CCI on September 16, 1985 with respect to an "Emergency Motion for Stay Pendente Lite" filed by Defendants with the United States Court of Appeals for the District of Columbia Circuit of September 23, 1985 ("Emergency Motion"); and a motion for leave to respond and a response to such comments, filed by Defendants on November 8, 1985. Following a private settlement reached by the parties, CCI requested dismissal of both its complaint and an opposition to the Petition it had filed on September 26, 1985 ("Opposition"). In the order granting those requests, Defendants were informed that, notwithstanding the private settlement with CCI, they continued to be bound by our orders in this proceeding. Order, Mimeo No. 1183, at para. 3, released December 2, 1985. Despite the settlement, we must still address the issues raised in Defendants' Petition.

both within its telephone service area, without Commission authorization and to CCI's detriment, in violation of Section 214(a) of the Act and Section 63.54 of the Commission's Rules, 47 U.S.C. § 214(a) and 47 C.F.R. § 63.54, respectively. In addition to seeking the issuance of an order to show cause why NITCO and Northwest Cable should not be ordered to cease and desist from such alleged violations, CCI also sought compensatory and punitive damages.

3. In our March 18, 1985 *Order*, we found that Defendants had violated and were acting in continuing violation of Section 63.54 of our telephone/cable television cross-ownership rules and Section 214 of the Act because they had constructed cable television distribution facilities within NITCO's telephone service area in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana, without having petitioned the Commission and obtained a waiver of such rules and approval of an application to construct facilities. We directed that these, as well as any other unauthorized cable television system facilities, be divested by September 18, 1985. We also notified NITCO of its apparent liability for a $20,000 forfeiture penalty. We further ordered Defendants and CCI to undertake good faith efforts to negotiate a settlement of CCI's damage claims.[2]

4. NITCO sought reconsideration of our *Order*, arguing that we had erred in finding that Defendants were

---

[2] *Order*, at 1259. CCI formerly operated cable television system in Hebron, Indiana, which it sold to First PIC Acquisition Corporation. CCI's complaint alleged that Defendants were affiliated companies acting anticompetitively and that it was damaged by such anticompetitive behavior. In his capacity as NITCO's Executive Vice President, Rhys Mussman conducted pole attachment negotiations with CCI and its predecessor-in-interest even though he, himself, had been directly engaged in efforts to secure cable television franchises in the same communities for his own cable television operations.

affiliated companies within the meaning of Section 63.54 of our Rules. NITCO also argued that Rhys G. Mussman[3] should be allowed to continue providing video programming to viewers in Hebron and Lakes of the Four Seasons.[4] In denying reconsideration, we confirmed that the divestiture required by our *Order* applied not only to NITCO, but to Northwest Cable and Rhys Mussman. We also directed NITCO to pay the $20,000 forfeiture for which we had found it liable.

5. Public notice of our *Reconsideration Order* was given on August 20, 1985. The next day, officials of our Common Carrier Bureau's Enforcement Division met with counsel for the parties to determine what steps, if any, Defendants had taken and planned to take to comply with the good faith settlement efforts and divestiture requirements mandated by our *Order.* Counsel for Defendants advised that, NITCO planned both to appeal the Commission's *Reconsideration Order* and to request that the Commission stay its *Order.* The parties were advised that, based on precedent, the possibility of favorable action on such a stay motion by the Commission was unlikely but could be enhanced if the cable systems in question were placed in a trust arrangement pending a final court decision on NITCO's planned appeal. This was intended to permit Defendants to maintain the status quo, an equivalent financial position, but not to benefit

---

[3] Rhys C. Mussman is the president and sole officer, director, and shareholder of Northwest Cable which does business under the name Northwestern Indiana Cablevision. He operated the company as an individual proprietorship under the same name before its incorporation in April of 1983. Mr. Mussman is the son of Robert G. Mussman, NITCO's president, chairman and controlling stockholder, and served as NITCO's Executive Vice President prior to 1983 and as a consultant to NITCO until May 28, 1985 with essentially the same salary and benefit package he received under his prior title.

[4] Service in DeMotte has not yet commenced, although the system has been largely constructed.

from their continuing illegal actions in the event their appeal was unsuccessful. On the other hand, a trusteeship would permit the benefits of operation to flow back to Defendants in the event they were successful on appeal. With the assistance of the Bureau, the parties subsequently met several times and attempted to reach an agreement upon terms of an interim trust arrangement which would protect the interests of all those affected, including the public, pending a judicial determination on the merits of Defendants' pending appeal of our *Order*. However, such efforts were temporarily suspended at a September 9 meeting of the parties with Bureau officials when Northwest Cable's counsel advised that it was pursuing a sale of its cable systems to an alleged unaffiliated entity and the prospect of a sale appeared imminent.

6. On September 12, 1985, Defendants filed a joint motion seeking a thirty day extension, until October 18, 1985, of the September 18, 1985 date by which they had to divest cable television facilities they constructed without FCC authorization and in violation of our cross-ownership rules. Further, Defendants sought to extend, also until October 18, 1985, the date by which we had ordered NITCO to pay a $20,000 forfeiture. Although the Bureau agreed with CCI's characterization of such motion as an eleventh-hour plea, it granted a short extension of the divestiture date until September 30, 1985, solely in order to enable further continuing efforts to consummate a trust arrangement protecting the rights of all parties and those of the public, pending a final judicial determination of this matter. Further, the Bureau extended the date by which NITCO was to pay the forfeiture we had ordered until September 30, 1985 as well.[5]

---

[5] *Memorandum Opinion and Order*, released September 18, 1985, unreported. The September 30 deadlines were further extended by the Bureau to preserve the status quo pending our action on the instant Petition and action by the Court upon the Emergency Motion. Letter to Russel D. Lukas and David L. Nace from Chief, Common Carrier Bureau, dated September 24, 1985.

Counsel for the parties subsequently met with Bureau staff in further efforts to negotiate a satisfactory interim trust agreement. However, such efforts were finally abandoned on September 20, 1985 when counsel for Northwest Cable advised the Enforcement Division staff that there was little, if any, likelihood, that a trust agreement satisfactory to his client could be negotiated.

Defendants' Petition for Stay

7. In support of their Petition for stay of our *Order*, Defendants contend: 1) that they need not show that they will prevail on the merits of their appeal; 2) that Northwest Cable will suffer irreparable harm if the requested stay is not granted; 3) that no harm will result to other interested parties if the stay is granted; and 4) that the public interest would be served by issuance of the stay in order to preserve a continuity of cable television service to approximately 1,300 residences. In arguing that they are likely to obtain a reversal of our *Order*, Defendants contend, *inter alia*: 1) that our cross-ownership rules are overbroad; 2) that we engaged in unlawful summary fact-finding; and 3) that we invoked our Rules inconsistently.

8. On the other hand, CCI maintained that the Petition must be denied because, under applicable Commission and court decisions, Defendants have not justified the stay which they have requested.[6] In particular, CCI argued that the public interest is disserved every day that Northwest Cable continues to operate since Defendants will continue to profit from their anticompetitive behavior. It further argued that Defendants' chance of success on appeal is extremely remote. Finally, CCI contended that, during this two-year old proceeding, Defendants have

---

[6] CCI requested leave to file its Opposition three days late due to confusion over the impact on Commission action of the Emergency Motion before the U.S. Court of Appeals. Defendants did not oppose such request.

shown no deference to our jurisdiction or mandate and have not been dealing with the Commission in good faith. Accordingly, CCI argued that Defendants cannot be trusted, have "unclean hands", and are not worthy of special equitable relief.[7]

Discussion

9. In determining whether or not to grant a stay request, the Commission generally considers the following four factors: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the petitioner shown that without the requested relief, it will be irreparably injured? (3) Would issuance of a stay substantially harm other parties interested in the proceedings? (4) What action is in the public interest? *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Big Valley Cablevision, Inc.*, 85 FCC 2d 973, 978 (1981). These issues need to be explored separately for the matters of divestiture and forfeiture. *Holiday Tours* indicates that the first of these factors may be more liberally construed if the movant has made a substantial case on the merits and "the other three factors strongly favor interim relief". 559 F. 2d at 843. After examining Defendants Petition in light of these criteria, we find, with respect to divestiture, that, while their argument has little chance of success on appeal and that granting their motion, as filed, would harm both other interested parties and the public interest, nonetheless, it is possible that Defendants might suffer irreparable injury if divestiture were completed before the unlikely event that they were successful at the Court of Appeals. Our responsibility, therefore, lies in finding a mechanism to protect the public interest and minimize injury to other parties while

---

[7] Opposition at 14-19.

Defendants are permitted to exhaust their legal remedies. Only by placing the cable television facilities subject to our divestiture orders in trust can the interests of all parties, including the public, be protected. By so doing, Defendants will not be required to prematurely divest themselves of their cable systems if they are ultimately successful on appeal; Defendants will not be able to profit from continued anticompetitive and illegal activities should they lose on appeal;[8] and the public will not be deprived of continual cable television service. Accordingly, with respect to divestiture, we will stay the effectiveness of our *Order* subject to the imposition of the interim trust conditions specified in the Appendix hereto.

10. Turning to the matter of the forfeiture, we find Defendants' position to be unpersuasive. While all the public interest arguments relating to divestiture remain relevant, there is not a countervailing argument of irreparable injury. Defendants have never alleged that they lack the financial resources to pay the forfeiture, and in the event they are successful on appeal, the funds can, of course, be promptly returned. Therefore, the petition for stay will be denied with respect to the forfeiture.

Likelihood of success on the merits

11. Defendants contend that our telephone/cable television cross-ownership rules are overbroad and do not provide a "clear and complete statement which will give adequate prior notice of a standard by which conduct can

---

[8] *See* Appendix at para. 9 where trust conditions we have ordered require all profits accruing during the trusteeship to be donated to a charitable organization should Defendants lose on appeal. A similar result was required in CC Docket No. 20939 by Memorandum Opinion and Order, FCC 82-484, at para. 5, released November 3, 1982, where we granted continuing authority to operate certain radio facilities conditioned, *inter alia*, upon the distribution of certain profits to a charitable organization. *See* Pass Word, Inc., 93 FCC 2d 1284, 1285 (1983).

be measured", citing *Pressley v. FCC*, 437 F. 2d 716, 721 (D.C. Cir. 1970). This position is utterly without merit. In *Pressley*, the Court expressed "some feeling of unease" that we had never instituted any rulemaking proceeding to provide a clearer guide to the kinds of conduct which would be regarded as disqualifying under our policy concerning the filing of so-called "strike" applications. On the other hand, our telephone/cable television cross-ownership policies, rules, and guidelines were adopted in 1970 pursuant to a rulemaking proceeding, long before Defendants commenced their unlawful construction. Thus, Defendants had adequate prior notice of the applicable standard. The attribution standards applicable under Section 63.54 of our Rules, 47 C.F.R. § 63.54, are clearly defined and specific examples delineated in Note 1 to that rule. Further, under Section 63.56 and 63.58 of our Rules, waiver of otherwise prohibited relationships may be granted for good cause shown in a duly filed application pursuant to Part 63 of our Rules. Our telephone/cable television cross-ownership rules have been judicially affirmed[9] and have withstood the test of time since they were first promulgated more than fifteen years ago. Further, our rules, for the most part, were recently codified with the adoption of the Cable Communications Policy Act of 1984, 47 U.S.C. § 601, *et seq.*, ("Cable Act"). *See* Title VI of the Act, particularly Section 613 (b). We consciously chose to retain the current attribution rules, as recommended by the Department of Justice and numerous cable interests, when we implemented the Cable Act. We found nothing in the Cable Act or its legislative history to indicate that Congress believed any change in this respect would be desirable.[10]

---

[9] General Telephone Co. of the Southwest v. U.S., 449 F.2d 846 (5th Cir. 1971).

[10] In the Matter of Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, FCC 85-179, released April 19, 1985, at para. 58; 58 R.R. 2d 1, 16-17.

12. Furthermore, our finding that Defendants were affiliated companies within the meaning of Section 63.54 of our Rules is supported by substantial, uncontradicted evidence of record. Such evidence was submitted, for the most part, by Defendants themselves. Because Defendants were and continue to be, in fact, "affiliates" within the meaning of Note 1(a) to Section 63.54, they have and are engaged in anticompetitive behavior which our cross-ownership rules were designed to preclude. Contrary to Defendants' argument, we did not simply presume "control" or an "affiliate" relationship within the meaning of Section 63.54 from the fact of the father-son relationship between Robert and Rhys Mussman. In enforcing such rule, we properly disregarded the separate corporate veils of NITCO and Northwest Cable because of prohibited direct and indirect business and financial relationships between Defendant corporations, in addition to the business and financial relationships, irrespective of their familial relationship, between Robert Mussman and Rhys Mussman, the principals of NITCO and Northwest Cable, respectively. As we summarized at para. 3 of our *Reconsideration Order*, our *Order* found that:

> Defendants had been involved in a number of direct and indirect relationships, each of which was and continues to be prohibited by Section 63.54 of our Rules. Such relationship included, *inter alia*:
>
> > (a) guarantees of substantial bank loans to Northwest Cable by Robert Mussman, NITCO's chairman, president and controlling stockholder;
> >
> > (b) Robert Mussman's guarantee of an indemnity agreement by his son, Rhys Mussman, for Northwest Cable concerning litigation Rhys Mussman instituted against the Town of Hebron with respect to cable television;
> >
> > (c) NITCO's retention of Rhys Mussman on its payroll, including employee benefits, after his

resignation as its Executive Vice President from January 1, 1983 through a period when he was not receiving any salary as president of Northwest Cable, but while he was active in cable management;

(d) Robert Mussman's lease of office space to Northwest Cable;

(e) Robert Mussman's acceptance or acquiescence in NITCO's subleasing of his property to Northwest Cable for the site of the headend of its Hebron cable television system;

(f) agreements by which NITCO constructed and agreed to maintain cable television facilities for Northwest Cable in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana; and

(g) lease agreements by which NITCO furnished space on is poles for Northwest Cable's cable television systems in those communities.

While Defendants acknowledge these relationships, they have never sought waiver of Section 63.54 with respect to any of them.[11]

13. Although our *Order* was supported by factual findings based upon evidence in the record submitted largely by Defendants, we did not find that we could agree with the ultimate legal conclusions Defendants argued should have been drawn from such evidence. Nor did we find that we could rely upon every factual representation made by Defendants or their principals. We note, in this connection, that Rhys Mussman made inaccurate representations either to this Commission or to public officials of the Town of Hebron, Indiana. Specifically, Mr. Mussman represented to the Commission that

---

[11] These facts were all ascertained from Defendants' filings and were not contested. *See, e.g.,* Amended Answer of NITCO filed May 18, 1984.

his father, Robert Mussman, had never served as Secretary-Treasurer or as any other officer of any cable company in which he, Rhys Mussman, was involved.[12] However, speaking on behalf of his company (*i.e.*, Rhys G. Mussman d/b/a Northwestern Indiana CableVision) at a public meeting before the Board of Trustees of the Town of Hebron on April 28, 1982, Rhys Mussman represented that his father was then Secretary-Treasurer of his cable company.[13] Further, while the record is clear that Rhys Mussman, as President of Northwestern Indiana Cablevision submitted cable television proposals to public officials of Hebron and DeMotte in 1980,[14] he initially represented to us that it was not until February 1, 1983 that he began doing business under that name.[15]

14. Contrary to Defendants' further contention that our orders were based upon disputed factual allegations requiring a full evidentiary hearing to resolve, our orders were based upon uncontroverted evidence which, as already noted, was furnished largely by Defendants themselves.[16]

---

[12] "Response to Consolidated Reply to Amended Answers of Northwestern Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc.", filed July 9, 1984, at para. 4; *see also* "Reply to Opposition to Petition for Reconsideration of Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture", filed by NITCO on May 17, 1985, at para. 29.

[13] "Consolidated Reply to Amended Answers of Northwestern Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc.", filed by CCI on June 11, 1984, Exh. A, at 1 and 6.

[14] Amended Answer of Northwest Cable, Exh. 7 and 10.

[15] "Answer of Northwest Indiana CATV, Inc." filed November 28, 1983, at paras. 2 and 6.

[16] It should be emphasized that Defendants did not request a full evidentiary hearing until long after our *Order* was issued. Letter from Pamela L. Gist to Howard M. Wilchins, Deputy Chief, Enforcement Division, dated July 31, 1985. Such request was denied. Letter to David L. Nace and Pamela L. Gist from Howard M. Wilchins, dated August 21, 1985. For Defendants to come in at

In any event, it is black letter law that when the decisionally-significant facts in a complaint proceeding pursuant to Section 208 of the Act, 47 U.S.C. § 208, are undisputed and only the legal conclusions derived therefrom are controverted, we have ample discretion, and our practice almost universally has been, to resolve the matter upon the basis of the evidence of record without need of resorting to time-consuming and costly full evidentiary proceedings.[17] Section 208 provides, in pertinent part, that if any common carrier subject to this Act does not satisfy a complaint served upon it by the Commission within the time specified or there is reasonable ground for investigating the complaint, "it shall be the duty of the Commission to investigate the matters complained of *in such manner and by such means as it shall deem proper*" (emphasis added).[18] Our *Order* was issued pursuant to, *inter alia*, Sections 208 and 214(a) of the Act.[19] As CCI correctly noted in opposing Defendants' untimely request for a hearing, neither section mandates any particular form of proceeding for all cases. Under the applicable

---

this late date with such an argument is unfounded in principles of law and equity and appears solely intended to obfuscate the real issues in this proceeding.

[17] *See* Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250, 1266 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026, *reh. denied* 423 U.S. 886 (1975); *cf.*, United States v. FCC, 652 F.2d 72, 90-91 (D.C. Cir. 1980) (*en banc*); Southwestern Operating Co. v. FCC, 351 F.2d 834, 835 (D.C. Cir. 1965); Anti-Defamation League v. FCC, 403 F.2d 169, 171 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 930 (1969); Mobilfone of Northeastern Pennsylvania, Inc. v. FCC, 682 F.2d 269, 271 (D.C. Cir. 1965); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 630 and n. 34 (D.C. Cir. 1978) (*en banc*); *See also* 47 U.S.C. 154(j) and FCC v. Schreiber, 381 U.S. 279, 289 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (194).

[18] *See also* 47 U.S.C. § 154(i) and (j); Bunker-Ramo v. Western Union Telegraph Co., 25 FCC 2d 691 (1970).

[19] *Order* at 1259.

statutory provisions, we had discretion to undertake the enforcement action in this matter by means other than a costly and prolonged full evidentiary hearing before an administrative law judge.[20] We note, in this connection, that in asking that CCI's complaint be dismissed, Defendants did not contend that the critical legal issue raised therein, *i.e.*, whether they were affiliated companies within the meaning of our cross-ownership rule, could be resolved only after a full evidentiary hearing, rather than upon uncontroverted evidence in their pleadings. On the contrary, in opposing CCI's motion for pre-designation discovery, Defendants represented their willingness to cooperate to the fullest extent to help us resolve CCI's complaint upon the latter basis.[21] Furthermore, in finding willful violations of the Act and our cross-ownership rules, we did not need to nor did we find that Defendants deliberately intended to violate those rule. In order to find liability for forfeiture, it was necessary to find, as our *Order* did, only that "they knew they were doing the actions in question . . ." *Reconsideration Order* at para. 17. Accordingly, we find no necessity for further prolonging this proceeding with an evidentiary hearing to determine whether Defendant's conduct was intended to ensure compliance with our cross-ownership rules, as they contend, rather than intended to circumvent those rules, as CCI argued.

---

[20] *Cf., Heckler v. Chaney,* ——— U.S. ———, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). As we said in Department of Defense v. AT&T, 80 FCC 2d 287 (1980):

> In the absence of a *per se* statutory directive, Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554, does not automatically require a trial-type hearing. *ITT World Communications, Inc. v. FCC,* 595 F.2d 897, 900-01 (2d Cir. 1979). When Section 208 is construed in conjunction with the Act's general procedural authorization in Section 154(j) empowering the Commission to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice", it is clear that the decision of when trial-type hearings are necessary is one which lies within the discretion of the Commission. *Bell Telephone Co. of Pennsylvania v. FCC,* 503 F.2d 1250, 1266 (1974); *West Michigan Telecasters, Inc. v. FCC,* 130 U.S. App. D.C. 39, 42, 396 F.2d 688, 691 (1968). Moreover, our practice with Section 208 complaints has consistently been to resolve the issues on the basis of the written submissions if at all possible.
>
> * * * *
>
> . . . Where, as here, the Commission has been provided with sufficient information upon which to base its decision such that the receipt of additional evidence would serve no useful purpose, a trial-type hearing is not required. *City of Lafayette, La. v. Securities and Exchange Commission,* 454 F.2d 941 (1971), *affirmed, Gulf States Utilities Co. v. Federal Power Commission,* 411 U.S. 747 (1973). The evidence submitted was sufficient for us to comprehend the [facts], and all that remained was the need for a Commission interpretation of law based upon the facts submitted.

80 FCC 2d at 289-90.

15. Defendants' reliance upon *Chesapeake and Potomac Co.*, FCC 85-48, released January 30, 1985, *recon. denied*, FCC 85-279, released May 30, 1985 ("*C&P*") is equally misplaced. *Reconsideration Order* at para. 14. *C&P* involved proposed tariff carrier-customer relationships to be covered by an FCC tariff filed by the carrier pursuant to Section 203 of the Act which would govern the business and financial relationships with its customer which were there involved. Such proposal was granted upon a duly-filed application seeking appropriate authority pursuant to Section 214(a) of the Act and our cross-ownership rules. NITCO, on the other hand, has never filed an application under Section 214 of the Act for authority to construct the subject cable television facilities within its telephone operating area. Defendants recognize the need for Section 214 authority when a telephone company constructs cable television facilities for its own direct or indirect benefit. (Petition, at n. 22).

---

[21] *See* Answers of Defendants filed November 28, 1983 and their "Joint Opposition to Motion for Orders to Make Answers More Definite and Certain and for an Order Authorizing Pre-Designation Discovery", filed December 28, 1983.

Indeed, in at least this one respect, this constitutes an admission on the record that they have violated the Communications Act. In this case, NITCO obviously had an interest in what cable television company or companies could become potential competitors for its telecommunications business. Unlike the telephone company in *C&P*, *supra*, and *Eagle II*, *infra*, Defendants here completely ignored the Section 214 filing required under our cross-ownership rules and continue to do so up to this day.

16. Furthermore, we found no merit in NITCO's argument that, under Section 2(b)(2) of the Act, 47 U.S.C. § 152(b)(2), it is merely a "connecting carrier" and therefore not subject to Section 214 of the Act.[22] Nevertheless, telephone companies which are "connecting carriers" with respect to their telephone operations become subject to Section 214 when they construct and operate, directly or indirectly, cable television facilities.[23] Even

---

[22] A telephone company engaged in interstate communication *solely* through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such telephone company is a "connecting carrier". Such carriers are exempt from the provisions of, *inter alia*, Section 214 of the Act. *See* 47 U.S.C. §§ 152(b)(2) and 153(u).

[23] Because broadcast television signals do not recognize state boundaries, a cable television system transmitting such signals constitutes part of an interstate "line" within the meaning of Section 214(a) of the Act when constructed by a telephone common carrier subject to our jurisdiction, such as NITCO. *See* General Telephone Co. of the Southwest v. U.S., *supra*, 449 F.2d at 859, n. 9; Section 214 Authorization, 98 FCC 2d 354 and 356 at n. 3 (1984); *cf.* General Telephone Company of California, 13 FCC 2d 448, 460-61 (1968), *aff'd*, 413 F.2d 390, *cert. denied*, 396 U.S. 888 (1969); Dimension Cable TV, Inc., *supra*, 25 FCC 2d at 527-28; Section 214 Certificates, 22 FCC 2d 746, 751 (1970). The need for certification pursuant to a Section 214 application is still necessary even in so-called "rural" areas of a telephone company's telephone service area. Eagle Communications, Inc., FCC 85-362, released July 1985, *petition for reconsideration filed* August 19, 1985 ("*Eagle III*") at n. 5.

if, *arguendo*, Section 214 were inapplicable in this case, which it is not, Defendants nevertheless are subject to our cross-ownership rules and, *inter alia*, sections 208, 209, 503(b) and 613(b) of the Act. *Reconsideration Order*, at n.24; *Com Services v. Murraysville Telephone Co.*, FCC 85-553, released October 17, 1985.

17. In light of the foregoing discussion, we conclude that our finding that Defendants were affiliated companies within the meaning of Section 63.54 is supported by substantial evidence and was neither over-broad nor inconsistent with any prior or contemporaneous FCC decision.[24] Defendants have failed to substantiate their contentions to the contrary. On the record before us in this proceeding, we also find no merit in Defendants' further contention that NITCO is not subject to, *inter alia*, Sections 206 and 207 of the Act.[25] We conclude, therefore, that Defendants have shown neither a likelihood of success nor a substantial case on the merits.

Irreparable injury

18. Contrary to Defendants' argument, Northwest Cable is not faced with an either/or choice of selling its facilities or shutting down. The trust arrangement is a viable option to preserve Northwest Cable's rights pending appeal and also maintain the status quo with respect to cable television service to some 1,275 Northwest Cable customers in Hebron and Lakes of the Four Seasons, Indiana who may wish to continue to subscribe to its service, whether or not alternative cable service may be

---

[24] Defendants' reliance upon Hawaiian Telephone Co., 16 FCC 2d 677 (1986), is unavailing. A limited stay was there granted in light of then pending appeal of fundamental jurisdictional issues determined in our seminal Docket No. 17333 decision.

[25] Under Sections 206 and 207 of the Act, 47 U.S.C. §§ 206 and 207, any common carrier subject to the Act is liable for consequential damages when it violates the Act.

available in those communities.[26] Defendants rely upon our order in *Eagle Telecommunications, Inc., FCC* 84-191, released May 8, 1984 (*"Eagle II"*) where, unlike the instant proceeding, the option of an interim trust arrangement was not considered. In *Eagle II,* we were concerned with whether to stay an order requiring divestiture of cable television facilities constructed without prior authorization in violation of our cross-ownership rules by Eagle Telecommunication, Inc. ("ETI"), a telephone common carrier, for its affiliated cable television company. We concluded that, if ETI were ultimately to win on appeal: "it would then be in the position of having to reconstruct facilities and reestablish customer relations. Because of the possibility of other cable television systems commencing operations in this area, it is not clear that ETI would necessarily be able to reestablish its present position . . . ."[27] Accordingly, we concluded that requiring ETI to divest its cable television facilities entailed "the possibility of irreparable injury to ETI . . . ."[28] We found that a stay of such divestiture requirement would preserve the relative positions of ETI and an independent cable television system already within ETI's proposed cable television service area. We also found a public interest benefit in continued service to customers then receiving cable television service over ETI's facilities. Based on our evaluation of the relative harms to the parties and an analysis of the public interest, we stayed our divestiture order but at the same time reaffirmed that no further construction could be undertaken.[29]

---

[26] First PIC Acquisition Corporation, CCI's successor-in-interest, is operating a cable television system in Hebron.

[27] *Eagle II* at para. 9.

[28] *Id.*

[29] *Id.*

19. We cannot accept Defendants' apparent argument that, because a trust arrangement may also have been possible in *Eagle II* but was not there considered, that somehow precludes us from considering such arrangement here. The interim trust ordered herein is designed to preserve the status quo. In our view, the status quo is maintained by providing a ceiling on the damages resulting from Defendants' anticompetitive behavior should they lose on appeal; providing for full reinstatement of investment and profits should Defendants prevail on the merits; and ensuring continued service to those members of the public currently receiving service from Northwest Cable. The thrust of Defendants' principal objections to a trust arrangement appears to be that no further system construction is contemplated thereunder. However, we note again that in *Eagle II*, upon which defendants rely, we likewise did not permit further construction during the pendency of the stay. Fundamentally, the purpose of a stay, with or without a trust arrangement, is to preserve the status quo; or "the existing state of things at any given date".[30] Clearly, for the Commission to allow further construction pending resolution of the merits of Defendants' appeal would not be preserving "the existing state of things"; rather it would exacerbate a situation which we already believe to be without legal foundation and would be in contravention of our public interest responsibilities. To the contrary, placing the cable systems which we have ordered divested in the trust arrangement, for which we provide hereinafter, will enable Defendants' interest to be protected *pendente lite*, as well as the interests of the public which we are mandated to preserve.

20. Just as Defendants have not shown that the trust ordered herein places them in the same position in which ETI would have been placed had we denied its stay re-

---

[30] Black's Law Dictionary, 1581 (Revised 4th ed. 1968).

quest, Defendants also have not shown that, without the requested stay, they will be injured irreparably with respect to the forfeiture. It is well established that "mere economic loss", *e.g.*, monetary forfeitures, however, substantial, are not enough to establish a showing of irreparable injury where refunds can be made, if appropriate.[31] Defendants have not shown and cannot show that payment of the $20,000 forfeiture penalty, which can be promptly redressed should our orders be reversed by the court, constitutes irreparable injury.

Harm to interested parties

21. Defendants further have failed to show that grant of a stay would not substantially harm other parties interested in this proceeding. Continued operation of Northwest Cable's system in Hebron without having obtained, or even applied for, the requisite authorization—not only violates our cross-ownership rules and the pro-competitive policies underlying those rules and Section 613(b) of the Act—but such operations constitute unfair competition to the detriment of competitors and potential competitors of Northwest Cable and NITCO, particularly First PIC Acquisition Corporation, the successor-in-interest to CCI in Hebron and DeMotte, Indiana. In this respect, this case is distinguishable from the *Eagle Telecommunications* case where, in light of the Cable Act and revised Section 63.58 of our Rules, we authorized the telephone company to engage in cable television operations within a "rural" portion of its telephone service area.

Public Interest

22. The cross-ownership rules with which we are here concerned were adopted to preclude anticompetitive practices by telephone companies possessing monopoly power

---

[31] Virginia Petroleum Jobbers Ass'n v. F.P.C., *supra*, 259 F.2d at 925; Wisconsin Gas Co. v. F.E.R.C., 758 2d (1985); WIYN Radio, Inc., 59 FCC 2d 424 (1976).

over telephone pole facilities essential to cable television system entrepreneurs. Continuing violations of these rules in flagrant disregard of outstanding Commission decisions and orders, as in this especially egregious case, should not and will not be condoned. Defendants have not shown how the public interest would be harmed by the action taken herein. Indeed, implementation of the trust order will permit the multiple benefits specified in para. 19, *supra*. An alternative cable television system is operational and available to the public in Hebron; Defendants' DeMotte system has not commenced service to the public; and no reason appears why the public's interest in continuing service from the Hebron and the Lakes of the Four Seasons cable systems cannot be adequately protected through a trust. With respect to the $20,000 forfeiture we have ordered, NITCO has not shown in any way how prompt payment would adversely affect the public interest.

23. In view of the foregoing discussion, we disagree with Defendants' contention that *Eagle II* is controlling in this case. All of the facts, circumstances, public interest considerations, and equities involved in the *Eagle Telecommunications* case and in this proceeding are not similar. Unlike ETI, NITCO never has obtained nor even sought the Section 214 authorization required under our cross-ownership rules.[32] ETI ultimately was assessed and timely paid a $20,000 forfeiture for its previous violations of our cross-ownership rules and Section 214 of the Act. On the other hand, Defendants seek to indefinitely stay payment of a similar forfeiture penalty. Furthermore, unlike the *de minimus* injury to the independ-

---

[32] Because of intervening action of Congress in the Cable Act with respect to the "rural" exception to our cross-ownership rules, we ultimately granted ETI's Section 214 application in *Eagle III*. The rural exemption we there considered is inapplicable in the instant proceeding since it was not requested and no evidence was placed in the record to justify it.

ent cable operator considered in *Eagle II*, (*i.e.*, free service to 8 homes), substantial damages were here sought by CCI because of, *inter alia*, Northwest Cable's unlawfull commercial service to almost 1300 cable television subscribers.[33]

24. Our review of the four criteria for granting a stay, as enumerated in paragraph 9, *supra*, leads us to believe that the most equitable resolution of the instant matters, pending the result of the appeal before the U.S. Court of Appeals, is to require payment of the $20,000 forfeiture while placing operation of the cable company into an interim trust. In this manner, the public interest will be preserved, and anti-competitive behavior will be constrained, while Defendants retain the right to have all assets and profits earned in the event they are successful. While there are some costs associated with operation of the trust itself, they may properly be regarded as normal costs of litigation. The public interest and pro-competitive benefits of such a trust arrangement outweigh such costs in our estimation.[34] No such countervailing factors appear with respect to payment of the $20,000 forfeiture and we therefore order its payment immediately, but subject to the terms of the letter from the Chief, Common Carrier Bureau, to Russell D. Lukas and David L. Nace dated September 24, 1985, permitting the Court of Appeals to rule on Defendants' Emergency Motion for stay.

25. Within seven days of the release of this order, Defendants shall submit a list of at least three potential trustees, in order of preference. The trustee should ex-

---

[33] CCI sought in excess of three quarters of a million dollars in consequential damages. *See* NITCO's motion for extension of time, filed May 8, 1985, at n. 4.

[34] The staff is instructed to work with the trustee and Defendants to assure that all expenses associated with administering the trust are kept to a minimum.

hibit integrity, legal ability, knowledge of communications, character, reputation and proximity to the location of Northwest Cable. Further, the potential trustee shall have had no business or personal dealings in the past with Northwest Cable, NITCO, or the Mussman family. As noted elsewhere in this order, Defendants and Bureau staff had met on several occasions in an attempt to work out a mutually acceptable trust agreement (*See* paras. 5 & 6, *supra.*) During the course of those discussions, Defendants were asked more than once to provide the names of possible independent trustees. Thus Defendants should, without much further effort, be able to quickly provide the Bureau with trustee nominees.

Ordering Clauses

26. Accordingly, pursuant to Sections 2, 4(i) and (j), 208, 214(a), 314, 411(a) and 613(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i) and (j), 208, 214(a), 314, 411(a) and 613(b), and Sections 63.01, *et seq.* of the Commission's Rules, 47 C.F.R. §§ 63.01, *et seq.*, IT IS ORDERED, That the "Petition for Stay Pendente Lite" filed jointly by Northwestern Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc. on September 16, 1985 IS GRANTED to the extent indicated herein and OTHERWISE IS DENIED.

27. IT IS FURTHER ORDERED, That the "Petition for Leave to File Opposition", filed by Comark Cable Fund III d/b/a CCI Cablevision on September 26, 1985, IS DISMISSED as moot;

28. IT IS FURTHER ORDERED, That the "Motion for Leave to File Responsive Pleading", filed by Defendants on November 8, 1985, IS GRANTED;

29. IT IS FURTHER ORDERED, that NITCO shall pay the forfeiture ordered in this matter within seven (7) days of the release of this order;

30. IT IS FURTHER ORDERED, That stay of our divestiture orders IS CONDITIONED upon establishment of the Interim Trust specified in the Appendix;

31. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, IS DELEGATED AUTHORITY to approve amendments to the trust conditions in the Appendix should any be found necessary or appropriate to the implementation of our orders in this proceeding;

32. IT IS FURTHER ORDERED, That, within seven (7) days of the release of this Order, Defendants shall file nominations for a trustee of Northwest Cable's assets in accordance with para. 25, *supra*;

33. IT IS FURTHER ORDERED, That the Bureau SHALL cause a copy of this Order to be forwarded by certified mail, return receipt requested, to counsel for NITCO and Northwest Cable;

34. IT IS FURTHER ORDERED, That the effective date of this Order SHALL BE STAYED UNTIL seven (7) days after judicial determination of the request for stay pending before the United States Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

INTERIM TRUST

(1) All assets of whatever kind and stock of Northwest Indiana CATV, Inc. (Northwest Cable or Northwest) shall be placed in a trusteeship. Rhys G. Mussman will retain equitable interest in the assets and stock placed in trust;

(2) A trustee shall be appointed by the Chief, Common Carrier Bureau, to uphold the terms of the trust as provided herein and be compensated therefor in accordance with terms approved by the Common Carrier Bureau. He shall have a fiduciary responsibility to maintain all assets of the company, and to retain all books and records of Northwest. During his term, no compensation, dividends, interest or payments of any kind whatsoever may be paid to Northwestern Indiana Telephone Company, Inc. (NITCO), its employees, its consultants or any member of the Mussman family except as provided herein; Rhys G. Mussman shall have the right to inspect the company's books during normal business hours upon prior reasonable notice.

(3) The Trustee shall maintain the status quo with respect to operation of the company. In particular, no construction whatsoever of cable television distribution facilities, including the addition of subscribers, shall take place. Also, NITCO shall not construct within its telephone service area facilities intended for or the primary use of which would inure to the benefit of present or future cable television systems without prior Commission authorization;

(4) Without the prior express written approval of the Common Carrier Bureau's Enforcement Division (also referred to hereafter as "the Enforcement Division"), neither NITCO nor any of its employees, consultants, subsidiaries or affiliates will participate directly or in-

drectly in the operation, maintenance or management of Northwest Cable or any other cable television company operating in NITCO's telephone service area during the term of the trust;

(5) The Trustee shall have the right to borrow sums, compromise and pursue claims, run operations and take any actions deemed appropriate to the conduct of business of Northwest during the term of the trust, including payment of duly tariffed charges properly billed for telephone service rendered by NITCO and other common carriers. He or she shall acquire appropriate indemnification insurance;

(6) All assets and securities of Northwest shall be transferred to the Trustee within seven (7) days of his or her appointment;

(7) In the event that the Commission's orders are reversed on the issue of divestiture by the United States Court of Appeals and, if filed, a petition for a writ of certiorari is not granted, the trust provided for herein shall be terminated within five (5) days of such denial of writ and all assets shall be returned to predecessors-in-interest. If such a writ is granted and if the Supreme Court reverses the Commission's decision on the issue of divestiture, the trust will terminate within five (5) days and all assets shall be returned. If the Court of Appeals or Supreme Court orders a remand of this proceeding without resolving the issue of divestiture, the trust provided for herein shall remain in effect through such further proceedings unless otherwise determined by those forums.

(8) In the event that Commission's orders are upheld by the United States Court of Appeals and, if requested, a petition for writ of certiorari is not granted, the Trustee shall be empowered to sell all assets at market value and shall notify the Commission monthly as to the status of such efforts. If the Trustee has not entered into an agree-

ment for sale within six (6) months of assuming such authority, or if closing does not take place within nine (9) months of such time, the Common Carrier Bureau shall have the right to appoint a succesor trustee at any time for the purpose of facilitating sale of the assets;

(9) The Trustee shall, within the first sixty (60) days after taking office, receive appraisals of the going concern value of Northwest. Such valuations shall include all property, including securities, cash balances and other assets and liabilities included in the corpus of the trust. The appraiser selected by the Trustee shall be approved by the Enforcement Division prior to commencing its activities. This appraisal shall constitute the base value of the company for the purposes of this trust. In the event the Orders of the Commission are affirmed in the Federal Courts and disposition of the assets of the trust occurs, in accordance with the terms set forth in paragraph eight (8) above, the Trustee shall order a final accounting to determine the difference between the base value appraisal and the net value of the corpus at the date of termination of the trust. If the difference in valuation is positive, such difference shall be paid to a charitable institution or institutions after consultation with the Enforcement Division. All remaining assets less expenses required to terminate the trust shall be distributed to Rhys Mussman, currently sole equitable shareholder of Northwest, or to his heirs and assigns. In the event there is no difference or the difference is negative, the entire amount, less expenses required to terminate the trust, will be distributed to Rhys Mussman, his heirs and assigns. The trust will be terminated at the completion of the final accounting and distribution as described in paragraph twleve (12), below;

(10) The Trustee shall cause to be prepared opening-day and year-end financial statements consisting of a balance sheet, income statement and sources and applications of funds statement. Such statements will be pre-

pared by a CPA and will be in accordance with generally accepted accounting principles. In addition, quarterly unaudited statements shall be prepared. All such statements shall be maintained in the offices of the Trustee and shall be made available for inspection by the Commission staff on twenty-four (24) hours' notice. All such information shall be held in confidence by the Commission staff and shall not be disclosed to any member of the public, subject to orders of a court of competent jurisdiction or the Commission;

(11) Rhys Mussman shall retain the right to direct the Trustee to sell any or all of the assets of the trust to anyone not part of the Mussman family, employed by NITCO, or otherwise affiliated with NITCO within the meaning of 47 C.F.R. § 63.54 at any time before the United States Court of Appeals or Supreme Court renders a decision. In such an event, the Trustee shall hold all sums received for such assets in escrow pending a final accounting and distribution regarding such assets according to the provisions set forth in paragraph nine (9), above;

(12) All final payouts contemplated under the trust shall be made within sixty (60) days after closing the sale of all assets. Final accounting shall be made, and upon its issuance, the trusteeship will terminate;

(13) The Trustee shall report to the Commission any violation of the above provisions and/or of the Commission's Rules within seven (7) days of discovering such violation(s), and shall serve copies of such reports on counsel for NITCO;

(14) The Common Carrier Bureau is authorized to carry out the responsibilities of the Commission contemplated by this Interim Trust, including amendments thereof, for just cause.

DISSENTING STATEMENT OF COMMISSIONER DENNIS R. PATRICK

In re: Comark Cable Fund III

The Commission found on the record before it that defendants NITCO and Northwest Cable have violated its cable-telco cross ownership rules and, on reconsideration, affirmed that finding. *Comark Cable Fund III*, FCC 85-116, (*"March Order"*) released March 18, 1985, *recon.*, FCC 85-475, released August 23, 1985. The Commission gave defendant NITCO six months from the release of the *March Order* to bring itself into compliance with these rules by divesting itself of its cable interests. In response to defendants' motion for stay of the divestiture order, however, my colleagues now propose imposition of a trust arrangement pending the outcome of defendants' appeal of that order.

As a general principle, I do not believe that the Commission should inject itself into the day-to-day operations of a business. There are exceptions to this rule, of course, when resort to a Commission-imposed trustee arrangement are essential to facilitate marketplace transactions. *See, e.g., Evening News Association*, 58 RR 2d 1527 (1985). *Multimedia*, 58 RR 2d 924 (1985). This, however, is not such a case. For this reason, I must dissent to the majority's decisions to impose such an intrusive trustee structure. It is unreasonably burdensome, and, in my view, will not realize our objectives as quickly as possible.

I agree with my colleagues that defendants have also failed to meet three of the four criteria to which the Commission looks in weighing whether to grant a petition for stay of a Commission order. Defendants have shown neither that they are substantially likely to prevail on the merits of their appeal nor that the continued operation of their cable system will not irreparably harm their competitors. *See Memorandum Opinion and Order* at para. 6. The majority also concluded correctly that granting defendants' request would not further the public interest. *See id.* In ordering divestiture, the Commission gave petitioners six months to bring themselves into compliance with its rules. That deferral reflected a reasonable balancing of the public interests promoted by the cross-ownership rules with the public interest in preserving the access of petitioners' current customers to cable services. The public interest will not be served by further delay in enforcement of our original order.

In my opinion, defendants have also failed to show that, without the relief they request, they will be irreparably harmed. The Commission has given defendant NITCO ample time to divest itself of its cable interest. In such a situation defendant cannot claim that divestiture will cause irreparable harm. The Commission has not ordered a fire sale. Defendants do not claim that sale of the system would fail to compensate them fully, not only for their financial investment in the cable systems, but also for the present value of future profits from that business. Nor do they claim that, despite due diligence, they have been unable in the alloted time to find a willing buyer. Finally this is not a case in which the rural exception to the cross-ownership rules has been raised. *Compare Eagle Telecommunications Inc.*, FCC 84-191, released May 8, 1984.

Accordingly, I would deny defendants' request that the divestiture order be stayed. For this reason, I must dissent to the *Memorandum Opinion and Order* to the extent that it does not require defendants to come into compliance with our rules forthwith.

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. E-84-1

IN THE MATTER OF

COMARK CABLE FUND III d/b/a CCI CABLEVISION,
Complainant

v.

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.

and

NORTHWEST INDIANA CATV, INC. d/b/a
NORTHWESTERN INDIANA CABLEVISION,
successor to
RHYS MUSSMAN d/b/a
NORTHWESTERN INDIANA CABLEVISION,
Defendants

MEMORANDUM OPINION AND ORDER

Adopted August 13, 1985; Released August 23, 1985

BY THE COMMISSION:

1. Before us for consideration is a petition filed on April 17, 1985, by Northwestern Indiana Telephone Company, Inc. (NITCO). NITCO seeks reconsideration of our *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, FCC 85-116, released March 18, 1985 (Order) in the above-captioned proceed-

ing.[1] We there found that NITCO had constructed cable television distribution facilities in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana, within its telephone service area for Northwest Indiana CATV, Inc. (Northwest Cable) without prior Commission approval in violation of section 214(a) of the Communications Act (Act), 47 U.S.C. § 214(a), and Section 63.54 of our telephone/cable television cross-ownership rules, 47 C.F.R. § 63.54.[2] Among other things, NITCO was ordered to terminate all affiliations with Northwest Cable and divest all facilities prohibited by section 63.54 no later than six months from release of our Order, *i.e.*, by September 18, 1985. NITCO also was notified of its apparent liability for forfeiture in the amount of $20,000 for its willful and repeated violations of the Act and the Commission's Rules. For reasons discussed below, we are denying NITCO's petition for reconsideration.

---

[1] Also before us are: an April 29, 1985 letter from NITCO's attorney; an opposition to NITCO's petition for reconsideration filed by the complainant on May 1, 1985; a reply by NITCO filed May 17, 1985; a supplement and errata to the reply and a motion for leave to file such supplement filed by NITCO on June 4, 1985; complainant's motion to strike such reply filed May 23, 1985; NITCO's opposition to the motion to strike filed June 5, 1985; and complainant's reply thereto filed June 17, 1985. *See* also n. 15, *infra*.

[2] Section 214(a) provides, in pertinent part, that no carrier shall construct any interstate line without prior Commission authorization. Section 63.54 of the Rules proscribes, *inter alia*, the provision of video programming to the viewing public by any telephone company within its telephone service area, either directly, or indirectly through an affiliated company. A telephone company also may not furnish pole space or other rental arrangements to an affiliated company where such arrangements would be used to provide video programming to the viewing public within the telephone company's telephone service area. Affiliation in this connection is broadly defined to include "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship." Note 1(a).

Background

2. The facts and circumstances leading to issuance of our Order are recited therein and in previous orders in this proceeding and need not be reiterated at length. The proceeding was initiated by a complaint filed October 12, 1983, by Comark Cable Fund III, d/b/a CCI Cablevision (CCI) against NITCO and Northwest Cable (Defendants) raising serious issues of anticompetitive conduct and continuing Act and Rule violations which Defendants recognized ". . . could lead to the imposition of substantial penalties."[3] As early as April 1984, Defendants were cautioned by our Common Carrier Bureau (Bureau) that any further construction and operation of the subject cable television systems without Commission authorization might be found to violate our cross-ownership rules, would be at NITCO's peril, and would be subject to appropriate sanctions, including divestiture. Defendants nevertheless continued to engage in such conduct and sought neither Section 214 authorizations nor waivers of our cross-ownership rules. In ordering NITCO to terminate, by September 18, 1985, all affiliations with Northwest Cable prohibited by our Rules, we also required Defendants to report, no later than April 29, 1985, their proposals to comply with our Order in this regard. Defendants also were directed to report the results of their efforts to settle CCI's damage claims.

3. In our order we found that Defendants had been involved in a number of direct and indirect relationships, each of which was and continues to be prohibited by Section 63.54 of our Rules. Such relationships included, *inter alia*:

(a) guarantees of substantial bank loans to Northwest Cable by Robert Mussman, NITCO's chairman, president and controlling stockholder;

---

[3] Consolidated Reply to Consolidated Opposition to Motions for Extensions of Time, filed November 16, 1983, at para. 3.

(b) Robert Mussman's guarantee of an indemnity agreement by his son, Rhys Mussman, for Northwest Cable concerning litigation Rhys Mussman instituted against the Town of Hebron with respect to cable television in that community;

(c) NITCO's retention of Rhys Mussman on its payroll, including employee benefits, after his resignation as its Executive Vice President from January 1, 1983 through a period when he was not receiving any salary as president of Northwest Cable, but while he was active in cable management;

(d) Robert Mussman's lease of office space to Northwest Cable;

(e) Robert Mussman' acceptance or acquiescence in NITCO's subleasing of his property to Northwest Cable for the site of the headend of its Hebron cable television system;

(f) agreements by which NITCO construed and agreed to maintain cable television facilities for Northwest Cable in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana; and

(g) lease agreements by which NITCO furnished space on its poles for Northwest Cable's cable television systems in those communities.

While Defendants acknowledged these relationships, they have not sought waiver of Section 63.54 with respect to any of them.

Discussion

4. We turn initially to certain procedural issues which have arisen in this stage of the proceeding. CCI has requested that the reply to its opposition to NITCO's petition for consideration be dismissed or stricken as contrary to section 1.106(h) of our Rules, 47 C.F.R. § 1.106

(h).[4] In addition to limiting the evidence which may be taken on any reconsideration, Section 405 of the Act provides that reconsiderations "shall be governed by such general rules as the Commission may establish".[5] NITCO's reply fails to be limited to matters raised in the opposition and raises new arguments and defenses in contravention of section 1.106(h) of our Rules. Such arguments were readily available to it earlier in this proceeding and could have been included in its petition for reconsideration. We agree with CCI that, as our review Board stated in *Industrial Business Corporation*, 40 FCC 2d 69, (1973):

---

[4] Section 1.106(h) of our rules governing petitions for reconsideration provides that:

> [p]etitioner may reply to oppositions within seven days after the last day for filing oppositions . . . . Replies shall not exceed 10 double spaced typewritten pages, and shall be limited to matters raised in the opposition.

In granting an unopposed motion by NITCO for a 4-day extension of time to reply to CCI's opposition to the subject petition for reconsideration, the Bureau also granted an incorporated request for permission to file a pleading not to exceed 20 pages in length, in lieu of the 10-page limitation specified in Section 1.106(h). Even though the number of pages ordinarily permitted in this connection was thus doubled, NITCO failed to limit its reply to 20 pages. The only justification offered in this regard was that "[u]nder the press of its pleading deadline, NITCO has inadvertently exceeded its twenty-page limitation . . . ." Reply at n.19. NITCO asks that we waive the page limitation requirement or consider the facts asserted in its reply even if the pleading itself is excluded. On the other hand, CCI requests that the reply be stricken because only certain paragraphs therein "can be considered even remotely responsive to CCI's Opposition." Motion to Strike at 3. While NITCO stated that it would not oppose a supplemental response by CCI to the extent the reply addresses matters beyond those raised in CCI's Opposition, including new arguments NITCO apparently wishes to raise in any appeal of our final decision in this matter, CCI declined such invitation. CCI indicated that it would request an opportunity to respond to the new matters raised in NITCO's reply should its motion be denied. CCI maintains that our Rules do not permit further pleading cycles and that further delay of this already lengthy proceeding would benefit NITCO whose unlawful operations are continuing to the public and CCI's detriment.

[5] 47 U.S.C. § 405.

> [o]rderliness, expedition and fairness in the adjudicatory process require that reasonable procedural limits be established and maintained . . . .

40 FCC 2d at 70. Nevertheless, in light of the action we have taken herein, we do not believe that CCI will be unduly prejudiced by our considering the merits of arguments NITCO may not have raised as timely as it should have done. Accordingly, while we have not granted CCI's motion to strike NITCO's reply pleading, NITCO is admonished that we expect compliance with our procedural requirements and will not tolerate any effort to unduly delay this adjudicatory proceeding.

5. In asking reconsideration of our order, NITCO takes exception to our finding that it has violated the Act and our Rules. It claims that we made incorrect findings of fact and also seeks additional factual findings, some of which would be based upon new evidence NITCO seeks to introduce into the record.

6. NITCO initially challenges our finding that CCI "held non-exclusive franchises for cable television systems in the Towns of Hebron and DeMotte, Indiana" (Order, at para. 5), alleging that CCI never held a cable franchise in either town. However, as noted by CCI, the minutes of the Hebron Town Board meeting of October 23, 1984 indicate that the Town Board approved transfer of CCI's franchise to its successor-in-interest in Hebron, First PIC Cable Television of Indiana, Inc.[6] Further, as also noted by CCI, its predecessor-in-interest in DeMotte, Telecom Services, Inc., was granted a franchise for DeMotte on the same day Northwest Cable received a simi-

---

[6] *See* Petition for Reconsideration, Exh. E, at page 1.

lar one.[7] In any case, there is nothing in the record to indicate that, as successor-in-interest to Telecom Services, Inc., CCI did not assume all rights and privileges that company may have had with respect to the construction of cable television facilities in Hebron and DeMotte. Furthermore, even if we were to assume, *arguendo*, that CCI never had any right to engage in cable television activities in Hebron and DeMotte, that would not relieve NITCO of liability for violating the Act and our Rules. Any person has the right to file a complaint with the Commission regarding violations of the Act or our Rules without regard to whether injury has been suffered by the complainant as a result of the alleged wrongdoing.[8]

7. NITCO also challenges our finding that it had entered into oral contracts to construct cable television systems in DeMotte and Lakes of the Four Seasons prior to May 14, 1984, when written contracts were executed (Order, at para. 11 and 12). NITCO argues that, because construction of the systems did not begin until after that date, there were no oral contracts. Such conclusion is contradicted by the record. The written contracts expressly recite that "THIS AGREEMENT is made . . . to memorialize the terms of a previous oral

---

[7] *See* Northwest Cable's Amended Answer, Exh. 11.

[8] Section 208 of the Act, 47 U.S.C. § 208, provides, in pertinent part, as follows:

> *Any person* . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition . . . whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission . . . . *No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.* (emphasis added)

agreement between the parties . . . ."[9] In any event, Defendants readily concede the existence of contractual relationships between their companies, at least as of May 14, 1984, pursuant to which cable television facilities were constructed within NITCO's telephone service area. It is not material to our conclusions that construction was undertaken pursuant to oral or written agreements. Such construction without prior Commission authorization was unlawful.

8. Without explaining why it could not have done so before release of our Order,[10] NITCO alleges for the first time that Northwest Cable had requested cancellation of its contract with NITCO for construction in Lakes of the Four Seasons and that almost all construction was performed by Illiana Underground, a construction contractor with offices in Portage, Indiana. Further, NITCO alleges that half of the Lakes of the Four Seasons community is in Lake County, Indiana outside NITCO's service area.[11] NITCO, however, failed to furnish a copy

---

[9] Exhibits 1 and 2 of NITCO's Amended Answer.

[10] Section 405 of the Act, 47 U.S.C. § 405, provides, in pertinent part, as follows:

> Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission . . . believes should have been taken in the original proceeding shall be taken on any reconsideration. . . .

Section 1.106(c)(1) of our Rules, 47 C.F.R. § 1.106(c)(1), provides, in part, that a petition for reconsideration which relies on facts not previously presented to the Commission may be granted only if the petition relies on facts which relate to events which have occurred to circumstances which have changed since the last opportunity to present such matters; or the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

[11] NITCO argues that no Section 214 authorization would have been required if it had performed the construction in Lake County

of any written contract or to disclose the terms for such construction by Illiana Underground. More significantly, Defendants do not deny that NITCO constructed at least part of that portion of the Lakes of the Four Seasons cable television facilities which lies within its telephone service area in Porter County, Indiana without having requested authority to do so pursuant to Section 214 of the Act.

9. Also for the first time, NITCO submitted evidence in its petition for reconsideration, following release of our Order, that Robert Mussman's personal guarantee to the Town of Hebron with respect to litigation involving his son's cable television operations had been withdrawn on October 23, 1984. Again NITCO offers no explanation why, in direct contravention with its representation of November 28, 1983 that "NITCO will report the result of this effort [to reexecute the indemnity agreement or otherwise assure the town without Robert Mussman's personal guarantee] to the Commission promptly upon further action being taken",[12] it did not furnish such information in a timely fashion. We expect more of parties in proceedings before us, and we will not routinely waive our Rules on request. In any event, even if NITCO had timely furnished such evidence before we issued our Order, our final decision would not have been different. Robert Mussman's guarantee was merely one of the multitude of relevant factors. Other relationships prohibited under Section 63.54 of our Rules included, *inter alia*, permitting the sublease of his property

---

where it does not provide telephone exchange service. While we have granted blanket Section 214 authorization to telephone common carriers to construct cable television facilities outside of their telephone service areas so that a specific request in that regard is no longer necessary, we have never held that Section 214 was inapplicable or that a specific or blanket authorization was not essential under the Act of our Rules. *See* n.31, *infra*.

[12] NITCO Answer, at para. 15.

by NITCO for use as the headend site of his son's Hebron cable television system,[13] his guarantee of several bank loans to Northwest Cable, his lease of office space to Northwest Cable, and allowing NITCO to pay substantial consulting fees to Rhys Mussman as his primary means of support.

10. NITCO objects to our having given weight to Rhys Mussman's representations to public officials by which he linked his cable television activities with his father, Robert Mussman (Order, at para. 22). NITCO maintains that "despite [such] representations, all that existed was a familial relationship [and that business] matters of the father and son were factually separate and remain separate to this date." [14] However, notwithstanding Defendants' original representations that Northwest Cable had arranged its own independent financing, the record is clear that, as early as May of 1983, and continuing until June 24, 1985, Robert Mussman guaranteed substantial bank loans to his son's cable company.[15]

11. NITCO also seeks to introduce new evidence purporting to show that Rhys Mussman's oral consulting arrangement with it was non-managerial in nature until discontinued on or-about May 28, 1985; that the Hebron Town Board terminated Telecom Service, Inc.'s franchise

---

[13] It appears that Northwest Cable's proposed microwave radio receive site in DeMotte is located directly behind NITCO's DeMotte central office on NITCO property and that the receive site for its Lakes of the Four Seasons cable system also is located within NITCO's telephone exchange area. *See* CCI's petition to deny Northwest Cable's pending application (File No. CAR-22666-01) at para. 8.

[14] Petition for Reconsideration, at 11.

[15] *See* NITCO's Answer and Amended Answer, at para. 39 and Exh. 11, respectively; letter from David L. Nace to the Commission dated April 29, 1985; his letters of May 31, 1985 and July 1, 1985 to the Deputy Chief of the Bureau's Enforcement Division; and n.37, *infra*.

in October of 1982; that none of NITCO's agreements with consulting contractors is in writing; that CCI had an oral agreement for rental of its office facilities in Hebron; that the special provision defining gross subscriber revenues quoted in paragraph 19 of our Order applied to any cable television franchise holder in Hebron; and that mail addressed to CCI had been placed by the Post Office in NITCO's P.O. Box 67. Even viewing all such post-decision evidence in the light most favorable to Defendants, we do not find it of decisional significance with regard to our ultimate conclusions that Defendants were and continue to be affiliated companies within the meaning of Section 63.54 of our Rules and have violated that rule and Section 214(a) of the Act.[16]

12. NITCO argues generally that corporate law and cases involving broadcast station licensees are dispositive of the matter in its favor. We grant that general standards of corporate law may be relevant although NITCO has only relied on them in a general and non-specific manner. However, it is the Communications Act and the regulations promulgated thereunder which are of decisional significance in this proceeding. More particularly, the relevant and controlling criteria are telecommunication precedents under Title II of the Act involving common carriers and their obligations rather than cases

---

[16] NITCO maintains that it is common practice in the Hebron locality to have oral rather than written agreements and that various oral agreements between Defendants or their principals should be accorded valid legal merit. Such argument misses the point. The consulting and real property lease arrangements between the Mussmans and their companies were and continue to be unlawful—not because they were oral—but because they were and continue to be prohibited by Section 63.54 of our Rules. Similarly, the revelant consideration under Section 63.54 is not whether Rhys Mussman's duties under the consulting contract were managerial in nature. The contract itself that NITCO entered into with a person engaged in the cable TV business within its telephone service area is a relevant consideration.

under Title III of the Act involving broadcast licensees or even our broadcast/cable television cross-ownership rules.[17] Contrary to NITCO's argument, it is not necessary to find that there was common control over Defendants to find that they were and continue to be affiliated companies within the meaning of Section 63.54 of our Rules. As the note to that rule makes clear, any direct or indirect financial or business relationship between a carrier and its customer, except only the carrier-user relationship, is prohibited. Among other direct and indirect financial and business relationships between Defendants, which they have admitted, is a continuing arrangement by which NITCO subleases to Northwest Cable the headend site of the Hebron cable system. This relationship as well as other financial, technical and personal relationships mentioned in paras. 3 and 9, above, rendered Defendants affiliated or commonly controlled companies within the meaning of Section 63.54.[18]

13. Further, we cannot agree with NITCO's arguments that when the business relationships between De-

---

[17] We have "specifically declined to impose ownership attribution standards [applicable to media] in cable/telephone cross-ownership situations." Memorandum Opinion and Order, FCC 85-252, released June 24, 1985 (modifying our attribution policy as it relates to limited partnerships), at para. 22, citing Report and Order in MM Docket No. 84-1296, FCC 85-179, released April 19, 1985. We note that, for purposes of defining control of a cable television system under our cross-ownership rules, the attribution standards have always been much more stringent for common carriers than for broadcast stations. *See* Report and Order, FCC 85-179, released April 19, 1985 (implementing the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, October 30, 1984), at para. 55, where we noted that the "attribution standards differ from common carriers and broadcast stations."

[18] Note 1(a) to Section 63.54 clearly provides that the terms "control" and "affiliate", as used therein, bar:

> any financial or business relationships whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship.

fendants were formed, no standard had been clearly enunciated by which to judge those relationships or that we have never published a clear delineation of the parameters of our telephone/cable television cross-ownership rules. On the contrary, those rules have been clearly defined from the time when they first were promulgated more than 15 years ago.[19] While Note 1 to Section 63.54 defines affiliation quite broadly, the rules are specific and have been judicially affirmed. In our decision adopting the rules, we stressed that to fulfill its intended purpose, we would broadly interpret the concept of affiliation and that our rules would so provide.[20]

14. Furthermore, NITCO's reliance upon our recent decision in *Chesapeake and Potomac Telephone Co.*, FCC 85-48, released January 30, 1985, *recon. denied*, *Memorandum Opinion and Order*, FCC 85-279, released May 30, 1985 (*C&P*) is unavailing. Unlike the circumstances in the instant case, *C&P* involved no construction of cable television distribution facilities by a telephone company within its telephone service area *without prior Commission authorization.* On the contrary, in that case we granted an application, duly filed pursuant to Section 214(a) of the Act and our cross-ownership rules, which

---

[19] Section 214 Certificates, 21 FCC 2d 307, *recon. in part*, 22 FCC 2d 746 (1970), *aff'd sub nom.* General Telephone Co. of the Southwest v. U.S., 449 F.2d 846 (5th Cir. 1971).

[20] *Id.* at 325. Our Rules also provide for waiver of prohibited relationships upon petition on a showing of good cause. Section 63.56(a), 47 C.F.R. § 63.56(a), as amended, provides as follows:

> In those areas where the provision of video programming to the public demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause, the provisions of §§ 63.54 and 63.55 may be waived, on the Commission's own motion or on petition for waiver, if the Commission finds that the public interest, convenience and necessity would be served thereby.

Such was not the case here.

had sought certification that the public interest would be served by the construction there proposed; full opportunity was afforded all interested parties to comment on such application; the proposal was supported by the National Telecommunications and Information Administration, among others commenting; a public offering to be tariffed at the Commission was involved and, thus, a "carrier-user relationship" within the meaning of the sole exception to the broad language in Note 1(a) to Section 63.54; anticompetitive concerns of the National Cable Television Association were considered; and our grant of the application was expressly conditioned to require separate accounting safeguards in order to prevent unlawful cross-subsidization and "provide a basis for subsequent action, should it prove necessary."[21] In contrast, the financial guarantees, lease arrangements, and other business relationships which we found existed, and some of which continue to exist, between Defendants and their principals are amply documented on the record in this case and, because they do not come within the "carrier-user" exception in Note 1(a), they render Defendants affiliated companies within the meaning of Section 63.54 of our Rules. Contrary to NITCO's conclusory assertion that it is not directly or indirectly engaged in providing video programming to the viewing public, because Defendants are affiliated companies, we properly disregarded their separate corporate veils and found cable television services offered by Northwest Cable to be cable operations of NITCO. Order, at para. 27.

15. Our Order properly disregarded Defendants' separate corporate entities, found them to be violating the Act and our Rules, and required them to file a report of

---

[21] C&P, *supra*, at para. 20. Because *C&P* involved a proposed tariff offering comparable to traditional common carrier tariffed channel service offerings, we found the relationship there between the telephone company and its customer to be "no different from any other carrier customer relationship and, thus . . . no violation of our cross-ownership rules." *C&P, supra*, at para. 19.

the results of their efforts to divest the cable television systems unlawfully constructed by Rhys Mussman, Northwest Cable and NITCO and to settle CCI's damage claims.[22] Contrary to NITCO's contention that compliance with our Order can be accomplished without divestiture of Northwest Cable's cable television systems, our Order required, in the absence of the grant of waivers of Section 63.54, divestiture no later than September 18, 1985, of all cable television distribution facilities constructed by NITCO for Rhys Mussman's company, both before and after its incorporation as Northwest Cable, without prior authorization in violation of Section 214(a) of the Act and Section 63.54 of our cross-ownership rules.[23] On the record of this proceeding, we have authority under Section 411(a) of the Act to issue orders directed against Rhys Mussman and Northwest Cable to the same extent as we may against NITCO.[24] Contrary to Defendants' contention that Rhys Mussman may continue to own and operate the cable systems we found Defendants unlawfully constructed and continue to operate unlawfully in violation of our cross-ownership rules, the divestiture required by our Order applies not only to Defendants (which we consider to be one entity because of their affiliation for purposes of enforcing those rules),[25] but also to Rhys Mussman as the predecessor-in-interest to Northwest Cable and its sole officer director and shareholder.

---

[22] Order at paras. 29, 31-33, 37 and 39.

[23] Order at paras. 27 and 29. *Cf.*, Memorandum Opinion and Order, Mimeo No. 5004, released June 10, 1985 (unpublished) concerning an application by Glacier State Telephone Company for Section 214 certification and waiver of Section 63.54 in order to become affiliated with a cable television system operating within its telephone service area. Grant of a temporary waiver by the Bureau was there founded upon its understanding and expectation that the cable system to be acquired would be divested in the near future.

[24] Contrary to NITCO's argument that it is merely a "connecting carrier" within the meaning of Section 3(u) of the Act and, therefore, that we do not have jurisdiction to order it to pay damages to CCI under Section 209 of the Act, NITCO is subject to, *inter alia,* Sections 208, 209, 214(a), 503(b) and 613(b) of the Act because of its construction of interstate lines for the provision of CATV service. *See,* General Telephone Co. of the Southwest v. U.S., 449 F.2d 846 (5th Cir. 1971). Order at para. 29. Furthermore, assuming *arguendo* that NITCO was merely a "connecting carrier" and thus not subject to Section 214 of the Act, NITCO would nevertheless be subject to the enforcement provisions of the Act, including Sections 208, 209 and 503(b). *Cf.* Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (6th Cir. 1962), *cert. denied,*

16. Rhys Mussman enjoyed competitive advantages vis-a-vis CCI as the result of certain direct and indirect relationships between Defendants which have been established in the record. These included, *inter alia*, locating to headend site of his Hebron cable system on property subleased to him by NITCO; more favorable terms and conditions for attaching to NITCO's poles than were available to CCI; a continuing source of income from NITCO during the start-up operations of his cable company and subsequently for a lengthy period during which he received little, if any, income and no salary from his cable company; financing for his cable operation which was guaranteed by NITCO's controlling stockholder and chief executive officer, Robert Mussman; and Robert Mussman's guarantee of Northwest Cable's indemnity agreement to the Town of Hebron with respect to certain

---

371 U.S. 820 (1962); Com Services v. Murraysville Telephone Co., —— FCC 2d ——, FCC 85-25, released February, 1985, *recon. pending*; General Services Administration v. Municipality of Anchorage, Mimeo No. 5681, released July 11, 1985, at para. 17; *contra*, Comtronics v. Puerto Rico Telephone Co., 553 F.2d 701 (1st Cir. 1977).

[25] See letter to Stephen S. Trott, Assistant Attorney General, from our General Counsel, dated March 26, 1985, at para. 1 where it is stated that the Commission found that NITCO *and Northwest Cable* "had violated the agency's telephone/cable television cross-ownership rules."

cable television litigation Rhys Mussman had initiated. Such competitive advantages occurred during a period when time was of the essence and resulted in giving Northwest Cable a headstart in constructing its DeMotte cable television system, even though DeMotte had granted cable franchises simultaneously to Northwest Cable and CCI's precedessor-in-interest. Time was also of the essence in CCI's pole attachment negotiations with NITCO in 1982, a time when Rhys Mussman was responsible for negotiating on NITCO's behalf, even though NITCO knew he had been engaged in efforts to secure cable franchises in Hebron and DeMotte as early as September 1980 and November 1980, respectively, for his own cable operations. The anticompetitive effects of this obvious conflict-of-interest, the prohibited non-tariffed relationships and arrangements between Defendants, and their failure to ever apply for the requisite Section 214 authorization before constructing cable facilities and engaging in cable television operations in communities within which NITCO provides telephone exchange service cannot be cured ex post facto in order to allow Rhys Mussman to continue to operate the subject cable television facilities, as NITCO has proposed. Nothing less than complete divestiture of Northwest Cable's assets is mandated by our Order barring waiver of our cross-ownership rules, consideration of which would have to weigh the breadth and severity of the violations found in this proceeding.[26]

---

[26] *Cf.*, Ashtabula Cable TV, Inc., 17 FCC 2d 113, 115, *recon. denied*, 18 FCC 2d 193 (1969). The instant case is distinguishable from Eagle Telecommunications, Inc., FCC 85-362, released July 19, 1985. There, in light of recent amendments to the Act contained in the Cable Communications Policy Act of 1984, we rescinded an ordered divestiture of a cable system constructed in a sparsely-populated rural area in violation of our then extant cross-ownership rules. Unlike that case, the cable systems here involved were constructed and unlawfully operated in urban or otherwise densely-populated parts of NITCO's service area and, thus, are unaffected by the 1984 amendments.

Forfeiture Liability of Defendants

17. We turn next to the argument that Robert Mussman and NITCO intended at all times to comply with applicable Commission requirements and that NITCO did not therefore "willfully" violate the Act or our telephone/cable television cross-ownership rules. We cannot so conclude. It long has been established that the word "willfully", as employed in Section 503(b) of the Act, does not require a showing that Defendants knew that they were acting unlawfully; it requires only a showing that they knew they were doing the acts in question—in short that the acts were not accidental.[27] While NITCO seeks to characterize its violations as not purposeful and at most technical, the circumstances under which the violations occurred nullify any claim that they were due to anything less than a flagrant disregard for compliance with our cross-ownership rules. NITCO does not contend that it was unaware of those rules. On the contrary, both Defendants independently confirmed that they were "knowledgeable" of the rules before any cable television facilities were constructed by NITCO within its service area.[28] Further, as we found in paragraph 24 of our Order, Rhys Mussman was advised to look into our cross-ownership rules as early as April, 1982, well in advance of his commencing cable television operations in Hebron, DeMotte, and Lakes of the Four Seasons. The violations could, and indeed should have been easily avoided. Certainly, the filing of CCI's complaint placed Defendants on notice that they could be violating our Rules; and there should not have been any question that was a real possibility after Defendants received our staff's warning, cited at footnote 37 of our Order, that further construction and operation of cable television facilities within NITCO's

---

[27] Midwest Radio-Television, Inc., 45 FCC 1137, 1141 (1963); *see also* cases therein cited, including Didriksen v. FCC, 254 F.2d 354, 356 (1958).

[28] NITCO and Northwest Cable Answers, at 2.

telephone service area without prior Commission authorization could lead to substantial sanctions, including divestiture. Defendants nevertheless elected to proceed without ever having applied for authorization pursuant to Section 214(a) of the Act and waiver of our cross-ownership rules.

18. NITCO maintains that any involvement by Robert Mussman with Northwest Cable, such as his personal guarantee for repayment of Northwest Cable's loans, was "for the benefit of Rhys as his son" rather than to protect a business interest of NITCO or himself in Northwest Cable. We cannot conclude, however, that Robert Mussman and NITCO had no interest in what cable television operator or operators sought to construct wideband telecommunication transmission facilities within its telephone service area.[29] If there was to be only one successful cable operator in these communities, Robert Mussman had every incentive to assure that it would be his son, rather than CCI. It was because of telephone companies' monopoly power over essential pole facilities and our desire to preclude anticompetitive abuses of such monopoly power that we adopted our cross-ownership rules. Order, at para. 23.

19. We have determined that even if we made additional findings of fact that NITCO has requested, it nevertheless has failed to show that our findings and conclusions that it has violated the Act and our Rules are incorrect. We have found that Defendants were and continue to be affiliated companies within the meaning of

---

[29] As noted by CCI, NITCO placed its Executive Vice President, Rhys Mussman, in charge of conducting pole attachment negotiations with CCI with full knowledge that he was planning to commence competing cable operations in the near future. Opposition to petition for reconsideration, at para. 16 The impropriety of placing Rhys Mussman in such an apparent conflict-of-interest position belies NITCO's professed willingness to negotiate fair pole attachment agreements with CCI and NITCO's professed esteem for the governmental process.

Section 63.54 of our Rules and that they have operated and continue to operate in violaiton of that rule. We further found such conduct by Defendants to constitute not only willful but also repeated violations of our Rules.[30] Further, we found that NITCO willfully and repeatedly violated Section 214(a) of the Act by constructing distribution lines for cable television systems in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana.[31] NITCO's unlawful furnishing of pole space and other rental arrangements in those communities in violation of our cross-ownership rules is continuing and began more than a year before issuance of the notice of apparent liability in our Order. Because a $2000 forfeiture penalty may be assessed for each violation and each day constitutes a separate violation, the maximum $20,000 penalty provided for under our Rules properly could be and was imposed.[32] We now will address NITCO's arguments that mitigating circumstances warrant rescission or reduction of the $20,000 forfeiture imposed on it by our Order.

---

[30] *See* Section 1.80(b)(2) of our Rules and Midwest Radio-Television Inc., *supra*, at 1142.

[31] NITCO contends that Section 214 does not encompass its construction of facilities on behalf of another entity when no ownership or control over interstate lines of communication is involved. However, both the statutory language and *C&P*, a case relied upon by NITCO, indicate precisely the contrary. *See C&P, supra*, at paras. 15-16. Section 214(a) provides, in pertinent part:

> No carrier shall undertake construction of a new line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require [such] construction . . .

See also Section 214 Authorization, 98 FCC 2d 355, 356 (1984) at notes 3 and 4; National Cable-Television Association, Inc. v. FCC, 747 F.2d 1503 (D.C. Cir. 1984); the legislative history underlying the Cable Communications Policy Act of 1984, H. Rep. No. 98-934, 98th Cong. 2d Sess. *reprinted in* [1984] U.S. Code Cong. & Ad. News 4655, at 4693-94; and Eagle Telecommunications, Inc., *supra*, at n.5.

[32] NITCO correctly notes that no forfeiture penalty may be imposed on it under Section 503 of the Act for violations which

20. Our Rules provide that the following factors be taken into account in determining the amount of a forfeiture penalty:

> the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

Section 1.80(b)(3). As previously discussed, we have concluded that the violations of our cross-ownership rules cited in our Order were willful, rather than inadvertent, and that they were repeated for more than two years and are continuing, rather than isolated instances. They also constitute serious rather than mere technical violations. Our rules were adopted at the urging of the Department of Justice, among others, to preclude telephone companies with monopoly power over pole facilities essential to independent cable television operations to engage in anticompetitive conduct. The nature, extent and gravity of the violations of those rules established on the record in this proceeding are unprecedented. Although NITCO argues that the $20,000 forfeiture penalty imposed is unusually large, we know of no similar violations of our telephone/cable television cross-ownership rules involving unlawful construction in urban or other densely-populated areas over the objections of a competing cable TV operator since

---

occurred more than a year before the notice of apparent liability in our Order. NITCO argues, for example, that, because construction of the Hebron cable television system was substantially complete in July of 1983, violations of Section 214 in that regard cannot be considered. Although our Order found violations which occurred both within and beyond the one-year statutory limitation specified in Section 503(b)(6)(B) of the Act, the forfeiture penalty properly may be assessed and was here imposed entirely on the basis of continuing violations occurring after March 18, 1984.

the rules were first enacted in 1970.[33] NITCO has not alleged that it is unable to pay the forfeiture or that its payment in full would impose any financial hardship. We cannot agree with its contention that imposition of the maximum forfeiture will serve no remedial purpose. By imposing such forfeiture, we intend to serve notice that willful and repeated violations of our telephone/cable television cross-ownership rules will not be countenanced.

21. NITCO argues, in mitigation, that consideration should be given to its attempted compliance with our Rules and to its cooperation with the Bureau's inquiry in this proceeding. In this connection, we initially note that we expect all Commission licensees and others within our jurisdiction to be forthright in their dealings with the Commission.[34] Furthermore, as correctly noted, by CCI, NITCO's cooperation in this matter was not entirely voluntary. Many of the facts on which our Order was based

---

[33] *Cf.*, Eagle Telecommunications, Inc., *supra*, and cases therein cited at para. 15, involving applications covering cable television systems unlawfully constructed in sparsely populated rural areas.

[34] As we recently noted:

> The Communications Act manifests a congressional view that the FCC must have full access to relevant information, to determine whether a carrier is properly discharging its obligations under the Act. The statutory plan is not for carriers to determine what information is to be furnished and when. It is for the Commission to do so . . .
>
> The FCC is a relatively small, overburdened agency. If it does not receive full cooperation from its regulatees when it needs relevant information, it cannot discharge its statutory responsibilities. The paucity of reported cases of this nature during the 51 years of the FCC's existence reflects the industry's understanding of this, and its substantial efforts to comply cooperatively with formal and informal requests for information . . . .

By Direction of the Commission letter, FCC 85-304, released June 12, 1985, admonishing U.S. West, Incorporated for failure to provide information promptly. *See* NewsReport No. CC-25, Mimeo No. 5091, dated June 12, 1985.

came to light only after a lengthy demand for particulars and the amended answer the Bureau directed NITCO to file.[35] Additionally, as CCI further noted, even though on November 28, 1983 Defendants represented that they would undertake efforts to have Robert Mussman's personal guarantee of an indemnification agreement from Rhys Mussman to the Town of Hebron withdrawn,[36] Robert Mussman nevertheless executed new guarantees of bank loans to Northwest Cable on four separate occasions in 1984.[37] Further, these guarantees, which continued until June 24th of this year, were signed during a period when Defendants were on specific notice that business relationships such as these could well constitute violations of our cross-ownership rules. Indeed, the record, taken as a whole, supports the contrary conclusion to that argued by NITCO—that Defendants deliberately acted in contravention of our Rules over the entire period in controversy.

22. Although NITCO further argues in mitigation that the penalty forfeiture should be reduced because it has no prior record of rule violations, CCI correctly noted that, from July 1983 through September 1984, Northwest Cable operated 13 channels *without* having obtained prior Commission authorization in violation of Section 76.610 (b) of our cable television aeronautical frequency use rules.[38] The stated and evident objective of those rules is the preservation of the life and safety of the public;

---

[35] *See* Memorandum Opinion and Order, released April 18, 1984 (unpublished).

[36] NITCO Answer at para. 15; Northwest Cable Answer at para. 16.

[37] *See* NITCO Amended Answer at Exh. 11 which includes loan documents guaranteed by Robert Mussman and dated February 24, 1984, March 20, 1984, March 30, 1984, and April 13, 1984.

[38] *See* letter to Stephen Ross from Pamela L. Gist dated October 12, 1984 (Attachment B to Opposition to Petition for Reconsideration).

and we view violations of those rules as a matter of great concern.[39]

23. In short, we are not persuaded that NITCO has shown either any basis for reconsidering our Order or mitigating circumstances sufficient to warrant our rescinding or reducing the $20,000 forfeiture penalty for which it is liable.

Ordering Clauses

24. Accordingly, IT IS ORDERED, pursuant to Sections 405 and 503(b) of the Communications Act, 47 U.S.C. §§ 405 and 503(b), and Sections 1.80 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.80 and 1.106, That the Petition for Reconsideration of Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, filed by Northwestern Indiana Telephone Company, Inc., on April 17, 1985, IS DENIED.

25. IT IS FURTHER ORDERED, That Northwestern Indiana Telephone Company, Inc. FORFEIT to the United States Government the sum of twenty thousand dollars ($20,000) in the manner provided for in Section 1.80(h) of our Rules within thirty (30) days from the release of this Order.

26. IT IS FURTHER ORDERED, That Northwestern Indiana Telephone Company, Inc. shall book such forfeiture to account 370, "Extraordinary income charges".

27. IT IS FURTHER ORDERED, That CCI's motion to strike IS DENIED.

28. IT IS FURTHER ORDERED, That the motion for leave to file a supplement to its reply, filed by NITCO on June 4, 1985, IS GRANTED.

---

[39] Comcast Cablevision Corporation, 86 FCC 2d 707 (1981); Frequency Channelling Plan-CATV, 85 FCC 2d 397 (1981); *see also* Amendment of Part 76, 99 FCC 2d 512, 519, 534 (1984); *see also* Amendment of Part 76, 99 FCC 2d 512, 519, 534 (1984).

29. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, shall send a copy of this Memorandum Opinion and Order by certified mail, return receipt requested, to Defendants' counsel, David L. Nace, Esq., Lukas, McGowan, Nace & Gutierrez, 1090 Vermont Avenue, N. W., Suite 650, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX F

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. E-84-1

IN THE MATTER OF

COMARK CABLE FUND III d/b/a CCI CABLEVISION,
Complainant
v.

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.
and
NORTHWEST INDIANA CATV, INC., d/b/a
NORTHWESTERN INDIANA CABLEVISION,
successor to
RHYS MUSSMAN d/b/a
NORTHWESTERN INDIANA CABLEVISION,
Defendants

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted March 12, 1985; Released March 18, 1985

BY THE COMMISSION:

1. Comark Cable Fund III d/b/a CCI Cablevision (CCI), a former operator of a cable television system in Hebron, Indiana, seeks a cease and desist order against Northwestern Indiana Telephone Company, Inc. (NITCO)

and Northwest Indiana CATV, Inc., d/b/a Northwestern Indiana CableVision (Northwest Cable) for conduct allegedly in violation of the Communications Act and the Commission's telephone/cable television company cross-ownership rules. For reasons fully discussed below, we find that Defendants and principals thereof have entered into agreements in violation of such rules, and that NITCO has constructed cable television distribution facilities without prior Commission authorization in violation of Section 214(a) of the Communications Act of 1934, as amended.[1] Therefore, we order NITCO to divest itself of all prohibited facilities and terminate prohibited affiliations with Northwest Cable. We are also issuing a Notice of Apparent Liability for Forfeiture against NITCO.

I. Background

2. On October 12, 1983, CCI initiated this proceeding by filing a complaint, pursuant to Section 208 of the Communications Act, against NITCO and Northwest Cable's predecessor, Rhys Mussman d/b/a Northwestern Indiana CableVision. The gravamen of CCI's complaint is that defendants are affiliated companies engaged in discriminatory and anticompetitive conduct in violation of the Act and the Commission's telephone/cable television company cross-ownership rules. More particularly, CCI alleged, *inter alia*, that NITCO was constructing and operating a cable television system in Hebron and constructing a cable television system in DeMotte, Indiana, both within its telephone service area, without Commission authorization and to CCI's detriment, in violation of Sections 202(a) and 214(a) of the Act and Section 63.54 of the Commission's Rules.[2] In addition to seeking the

---

[1] 47 U.S.C. § 214(a), provides, in pertinent part, that no carrier shall construct any interstate line without prior Commission authorization.

[2] Section 202(a) of the Act, 47 U.S.C. § 202(a), provides as follows:

issuance of an order to show cause why NITCO and Northwest Cable (Defendants) should not be ordered to cease and desist from such alleged violations, CCI also seeks compensatory and punitive damages and attorney fees.

3. On November 28, 1983, Defendants timely filed separate answers denying such violations and further denying that they were affiliated within the meaning of Section 63.54 of the Rules.[3] They asserted that Rhys G. Mussman resigned his position as Executive Vice President of NITCO on December 31, 1982 and that all deal-

---

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 63.54 of the Rules, 47 C.F.R. § 63.54, proscribes, *inter alia*, the furnishing of cable television service to the viewing public by any telephone company within its telephone service area, either directly, or indirectly through an affiliated company. A telephone company also may not furnish pole space or other rental arrangements to an affiliated company where such arrangements would be used to provide cable television services within the telephone company's telephone service area. Affiliation in this connection is broadly defined to include "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship." Note 1(a). *See* Cross-Ownership Rules, 82 FCC 2d 254, 264 (1980). *Cf.* Section 613 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Oct. 30, 1984.

[3] NITCO originally had been directed to either satisfy or answer CCI's complaint within 20 days. However, over CCI's objections, Defendants were granted an additional 10 days within which to file their answers because of our desire to have a full record before us. *See Memorandum Opinion and Order*, unpublished, released November 17, 1983.

ings between Defendants since then concerning the construction and operation of Northwest Cable or its predecessor were at "arm's length" and with fair compensation to NITCO.

4. On December 12, 1983, in addition to its reply to Defendants' answers, CCI filed a motion seeking an order to make answers more definite. In addition, or in the alternative, CCI sought an order authorizing the use of immediate discovery prior to designation of its complaint for an adjudicatory hearing. By *Memorandum Opinion and Order*, unpublished, released April 18, 1984, CCI's motion was denied insofar as it sought fully discovery prior to designation. However, NITCO was directed to file an amended answer providing certain additional information. Additional information was also requested of Northwest Cable. Separate amended answers were timely filed by Defendants on May 18, 1984.[4]

II. Findings of Fact

A. The Parties

5. CCI is a Florida limited partnership that held nonexclusive franchises for cable television systems in the towns of Hebron and DeMotte, Indiana. It has constructed a cable television system in Hebron. Service was commenced in December, 1982. CCI served about 375 subscribers in Hebron in October, 1983 when it filed its complaint. It subsequently sold its Hebron system.[5]

---

[4] Also before us are CCI's Reply to the Amended Answers filed June 11, 1984, a Consolidated Motion for Leave to File Responses to that reply, and separate responses to the reply filed by Defendants on July 9, 1984; and CCI's Opposition to the motion, filed July 19, 1984. Because CCI's Reply presented new factual evidence for consideration, Defendants' motion is granted.

[5] Complaint at 2; letter to the Commission from Robert E. Levine, counsel for CCI, dated November 19, 1984.

6. NITCO is an Indiana corporation and a communications common carrier providing telephone exchange services in Hebron, DeMotte, Lakes of the Four Seasons, and Mt. Ayr, Indiana.[6] It is a closely held family corporation controlled by Robert G. Mussman, its President, Chairman and one of three directors. Mr. Mussman owns 1050 of the company's 1100 shares of stock. The remaining 50 shares are owned by R. Gerald Mussman,[7] a director of the company and its Vice President. The third director and the company's secretary-treasurer, Myrtis E. Mussman, is Robert G. Mussman's wife. Until his resignation as Executive Vice President on December 31, 1982, their son, Rhys G. Mussman, was the highest salaried employee in the company after Robert G. Mussman. He continues as a consultant to NITCO and his fees for 1983 roughly equalled or exceeded his salary prior to his departure from the company as an employee. In his capacity as Executive Vice President, Rhys G. Mussman conducted cable television pole attachment negotiations with CCI's predecessor-in-interest, Telecom Services, Inc., during the last quarter of 1982.[8]

7. Northwest Cable is an Indiana corporation with cable television systems in the towns of Hebron and DeMotte, Indiana and Lakes of the Four Seasons, a planned residential development in unincorporated portions of Lake and Porter Counties, Indiana.[9] It received

---

[6] NITCO is also the radio licensee of station KSJ622 in the Public Land Mobile Service.

[7] R. Gerald Mussman and Rhys G. Mussman are different individuals.

[8] *Id.* at 3, 17-18; NITCO Answer at 1; NITCO Amended Answer at 6, 11, 13, 18, Exh. 16 at 93A; Reply to amended answers at 3-4; Response to reply to amended answers at 17, n.4.

[9] Northwest Cable has an application pending (FCC File No. CAR-22666-01) seeking authority to construct a station in the Cable Television Relay Service (CARS) to relay television signals via microwave radio from Hebron to DeMotte and Lakes of the

nonexclusive franchises for cable television systems from Hebron, Lakes of the Four Seasons Property Owners Association, Inc. (an Indiana not-for-profit corporation), and DeMotte on or about April 26, May 23, and August 1, 1983, respectively. Prior to its incorporation on April 4, 1983, Northwest Cable was operated as an individual proprietorship by Rhys G. Mussman, under the name Northwestern Indiana CableVision. It continues to operate under that name as a corporation. Rhys G. Mussman, Robert Mussman's son, serves as its president and its sole officer, director and shareholder. The company currently has three employees, one of whom was formerly NITCO's plant engineer.[10]

B. Agreements between Defendants or their principals

8. Several oral agreements were entered into between Defendants or principals thereof after Rhys G. Mussman's resignation as Executive Vice President of NITCO and while he continued as a consultant to the company. None of the agreements was reduced to writing until well after CCI filed its complaint. A consulting agreement between NITCO and Rhys Mussman never has been reduced to writing. The agreements are described below.

9. *Construction of Hebron cable television system.* In 1983, NITCO constructed a cable television system in Hebron for Northwestern Indiana CableVision pursuant to an oral agreement. The value of this construction was

---

Four Seasons, Indiana. CCI has filed a petition to deny such application. As of May 17, 1984, Northwest Cable represented that it had approximately 500 homes wired for service in the Four Seasons community, that the construction of its cable system at DeMotte was "nearing completion", and that it would begin service to the public in DeMotte as soon as the CARS facilities were authorized and constructed. Opposition to Petition to Deny filed May 22, 1984, at 11-12.

[10] Northwest Cable answer at 1, 3, 10; amended answer at 2, 9, 11-12, Exh. 8, 11, 12, 13 at Attachment G.

in excess of $70,800. A written contract for the maintenance of such system and construction of new lines was entered into on December 16, 1983 to become effective January 1, 1984.[11]

10. *Attachment to NITCO poles in Hebron.* On December 16, 1983, NITCO and Northwestern Indiana CableVision also reduced to writing their prior oral agreement by which cable television facilities could be attached to NITCO's poles in Hebron. The agreement calls for attachments at an annual rate of $4.00 per pole.[12]

11. *Construction of DeMotte cable television system.* Robert G. Mussman, on behalf of NITCO, and Rhys G. Mussman, for Northwestern Indiana CableVision, also entered into an oral contract by which NITCO constructed a cable television system in DeMotte, Indiana. That contract was not reduced to writing until May 14, 1984.[13]

12. *Construction of Four Seasons cable television system.* An oral agreement by which NITCO agreed to construct a cable television system for Northwestern Indiana CableVision in the community of Lakes of the Four Seasons, Indiana similarly was not reduced to writing until May 14, 1984.[14]

13. *Attachment to NITCO poles in DeMotte and Lakes of the Four Seasons.* NITCO and Northwestern Indiana CableVision's agreement for pole attachments in Hebron was amended on May 14, 1984 to apply also to NITCO's poles in DeMotte and Lakes of the Four Seasons.[15]

---

[11] NITCO amended answer at 7-8, Exh. 3.

[12] *Id.* at Exh. 4.

[13] *Id.* at Exh. 1.

[14] *Id.* at Exh. 2.

[15] *Id.* at Exh. 4.

14. *Lease of property at 301 North Washington Street.* Rhys Mussman, through Northwestern Indiana Cable-Vision, has leased property, including office space, at 301 North Washington Street in Hebron from his father, Robert G. Mussman and his mother, Myrtis E. Mussman. The parties operated under an oral lease from January 1983 until May 14, 1984 when the lease was reduced to writing. The property is immediately adjacent to NITCO's headquarters address at 205 North Washington Street, which property also is owned by Robert and Myrtis Mussman.[16]

15. *Sublease of property at 205 North Washington Street.* On May 1, 1984, Northwest Cable entered into a written agreement with NITCO to sublease a portion of the real estate surrounding the commercial office building at 205 North Washington Street which NITCO leased from Robert and Myrtis Mussman.[17] Northwest Cable's earth station antennas and other cable television equipment are located on the property so subleased, which includes a cement concrete pad constructed in April 1982 for a satellite television antenna also erected at that time.[18]

16. *Consulting Agreement.* NITCO has employed Rhys G. Mussman as a consultant since his resignation. Such agreement has never been reduced to writing. Mr. Mussman has received more than $57,000 from NITCO in consulting fees since 1983 from which social security and income taxes have been withheld. He continues to be covered by NITCO insurance and pension plans and has

---

[16] *Id.* at Exh. 5, 6; complaint at Exh. D-1.

[17] NITCO amended answer at Exh. 5.

[18] *See* excerpts from transcripts of minutes of April 28, 1982 meeting of the Board of Trustees of Hebron, Indiana, attached at Exhibit A to CCI's consolidated reply to amended answers, at 4-5 and attachment.

been provided with office furnishings within NITCO's headquarters offices. His consulting fees from NITCO for 1983 amounted to about the same sum as or exceeded his salary from NITCO for 1982. Rhys G. Mussman has not drawn any salary from his own company, Northwest Cable.[19]

17. *Financial guarantees.* Robert G. Mussman and his wife personally guaranteed six bank loans to Northwest Cable in the current principal amount of approximately $450,000.[20]

18. Robert G. Mussman also personally guaranteed the obligations of Rhys Mussman to the Town of Hebron under an indemnity agreement of April 26, 1983 in connection with litigation Rhys Mussman initiated against CCI and the town, among others. It appears that Rhys Mussman's efforts to reexecute the agreement or otherwise assure the two of his financial ability to adequately undertake his cable television commitments without Robert Mussman's personal guarantee, have been unavailing.[21]

C. *Special franchise provisions*

19. Section 2(k) of the franchise granted Rhys Mussman on April 26, 1983 by the Town of Hebron provides:

> "Gross Subscribers Revenues shall include any and all compensation or receipts derived by Grantee from the operation of the Cable Television System authorized herein, but shall not include any refunds or credits made to subscribers or any taxes imposed on the services furnished by Grantee, and *shall also not include consideration received directly or indirectly*

---

[19] NITCO amended answer at 9-11, 13, 14, Exh. 16 at 93A.

[20] NITCO amended answer at 18 and Exh. 11.

[21] Northwest Cable amended answer at Exh. 14; NITCO's answer at 6-7.

> *by Northwestern Indiana Telephone Company, Inc. from subscribers or users in payment of the receipt of signals other than broadcast television, radio or original cable cast programming of the Franchisee, whether for "Facsimile" transmission, "return" or "subscriber response communication", and whether or not transmitted encoded or processed to permit reception by only selected subscribers.* (emphasis added).

According to CCI, its Hebron franchise agreement does not contain a similar reference to "consideration received directly or indirectly" by NITCO.[22]

20. Section 22 of the franchise granted Northwest Cable or its predecessor on May 23, 1983 by the Lakes of the Four Seasons Property Owners Association, Inc. provides, in part:

> The term 'annual gross operating revenues' used herein shall not include any revenues received by Northwestern Indiana Telephone Company for its services it may render to its customers within the franchise area. . . .[23]

D. Common use of Post Office Box

21. NITCO's business address, *i.e.*, 205 North Washington Street or P.O. Box 67 in Hebron, has been used commonly by NITCO and by members of the Mussman family. Mail addressed to that post office box has been delivered there by the local Post Office, including mail addressed to Rhys G. Mussman or Northwestern Indiana CableVision.[24] Also, mail sent to Rhys Mussman in

---

[22] *See* CCI's reply at 4-5.

[23] *See* Attachment G to Exhibit 13 of Northwest Cable's amended answer at 10-11. *See also* Attachment C to that exhibit.

[24] *See, e.g.,* letter 1982 to Rhys Mussman from the First National Bank, Valparaiso, September 20, Exhibit 11 of the amended answer of Northwest Cable, at Exhibit J.

Hebron with no address specified has been deposited in P.O. Box 67 by the local Post Office. Even though the proper address for Northwestern Indiana CableVision has been 301 North Washington Street since January 1983, P.O. Box 67 continued to be specified as Northwestern Indiana CableVision's address on correspondence delivered as late as April 1983.[25]

E. The Mussman family business connection

22. In his efforts to obtain cable television franchises from the towns of Hebron and DeMotte, Rhys Mussman did not hesitate to link himself with members of the Mussman family, especially his father, who had ties to the communities and their affairs for many years. In his November 25, 1980 proposal to the DeMotte Town Board to build and operate a cable television system, Rhys Mussman noted that he was currently "Executive-Vice President of the Northwestern Indiana Telephone Company Inc. . . ." [26] At an April 28, 1982 meeting of the Town Board of Hebron, Rhys Mussman represented that "my father is the Secretary-Treasurer" of Northwestern Indiana CableVision.[27] When Hebron granted Northwestern Indiana CableVision a franchise on April 26, 1983, subsequent to both Rhys Mussman's resignation as NITCO's Executive Vice President and Northwest Cable's incorporation, Robert G. Mussman guaranteed Northwestern Indiana CableVision's obligations to Hebron under an indemnity agreement of the same date.[28] Rhys Mussman also linked Northwest Cable to his father in an

---

[25] *See, e.g.*, letter to Rhys Mussman from John Howard, April 19, 1983, Exhibit 11 of the amended answer of Northwest Cable of Exhibit A; NITCO amended answer at 14-15.

[26] Amended answer of Northwest Cable, Exh. 10 at unnumbered page 7.

[27] Exhibit A to reply to amended answers, at 6.

[28] *See* Northwest Cable amended answer, at Exh. 14.

August 1983 letter to the DeMotte Town Board to express his dismay that the town had not awarded an exclusive franchise to Northwestern Indiana CableVision but one also to Telecom Services, Inc., a competitor and CCI's precedessor-in-interest. In his letter, Rhys Mussman (who was less than 30 years old) said it seemed odd that the town had also awarded a franchise to an out-of-state company rather than award a single franchise to "*the person* who has been helping the community grow for *over forty years* . . . ." (emphasis added).[29] Like Hebron, the Lakes of the Four Seasons Property Owners Association apparently also perceived a connection between Northwest Cable and NITCO and a need to distinguish their revenues.[30]

III. Discussion and conclusions of law

A. The telephone/cable television company cross-ownership law

23. In our Final Report and Order in Docket No. 18509,[31] we considered "the anomalous competitive situation" between cable television systems which are affiliated with the telephone companies and those with no such affiliation, which must rely on attachments to the telephone companies' poles to construct their systems.[32] We recognized that the entry by a telephone company, directly or through an affiliate, into the retailing aspects of cable television service in a community within which it furnished telephone service could lead to "undesirable conse-

---

[29] *See* August 1, 1983 letter to DeMotte Town Board from Rhys G. Mussman, President, Northwestern Indiana CableVision, in Exh. 11 of Northwest Cable amended answer, see also Response of Northwest Cable to CCI's reply to amended answers, at 2.

[30] *See* paras. 19 and 20, *supra.*

[31] *Section 214 Certificate,* 21 FCC 2d 307, *recon. in part,* 22 FCC 2d 746 (1970), *aff'd sub nom. General Telephone Co. of the Southwest v. U.S.,* 449 F.2d 846 (5th Cir. 1971).

[32] *Id.* at 323.

quences" and anticompetitive abuses because of the telephone company's monopoly position over essential pole facilities within the community.[33] We concluded that:

> the public interest in modern and efficient means of communications will best be served, at this time, by preserving, to the extent practicable, a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities. . . .

and adopted a policy barring "all telephone common carriers from furnishing [cable television] service to the viewing public in their operating territory except when, for good cause shown, a waiver of this policy is granted." We also precluded telephone common carriers from providing cable television service directly or indirectly to the viewing public by entering into pole rental agreements with their affiliates in communities where they provide telephone exchange service.[34] In adopting rules precluding a telephone company from providing cable television service within its telephone service area directly or indirectly through an affiliated company, we said we would "broadly interpet the concept of affiliation" and barred "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and [cable television system], except only the carrier-user relationship." [35]

24. Defendants' pleadings demonstrate that they were aware of the Commission's telephone/cable television cross-ownership prohibition prior to any cable system construction or other organizational activity.[36] Indeed, as early

---

[33] *Id.* at 324.

[34] *Id.* at 325.

[35] *Id.* at 325-26 and 331.

[36] NITCO and Northwest Cable answers, at 2.

as April 28, 1982, Rhys Mussman was advised at a meeting of the Board of Trustees of the Town of Hebron that there had "been a lot of changes recently" in the telephone/cable television cross-ownership rules that he might "want to check into". Exh. A to reply to amended answers, at 5. Further, after being served with the subject complaint, Defendants also were placed on notice that they risked sanctions if they continued their cable television activities.[37]

25. Prohibited relationships include, *inter alia*, any person having a financial interest, including interests other than ownershp, in both a carrier and its customer.[38] Here, Robert Mussman not only controls the telephone company but also guaranteed repayment of substantial bank loans made to his son's cable television company, as well as guaranteeing certain obligations of his son to the Town of Hebron in connection with cable television franchise litigation. Although NITCO never has undertaken any non-tariffed construction project of more than $100,000,[39] Robert Mussman's telephone company entered into oral contracts with his son's cable company to construct cable television systems in Hebron, DeMotte, and Lakes of the Four Seasons involving amounts in excess

---

[37] In April 1984, Defendants' attorney was cautioned that:

> any further construction and operation of cable television facilities by Northwest Indiana CATV, Inc. within NITCO's telephone service area without prior Commission authorization is at its peril and may be found to be in violation of the Commission's telephone/cable television company cross-ownership rules and subject to appropriate penalties under the Communications Act, 47 U.S.C. § 151 *et seq.*, including divestiture.

Letter to David L. Nace dated April 18, 1984 from Chief, Enforcement Division, Common Carrier Bureau. Defendants' attorney also has been informally advised that action on Northwest Cable's CARS application (*see* n.9, *supra*) currently is being held in abeyance pending resolution of the instant complaint.

[38] 47 C.F.R. § 63.54 at n.1(b).

[39] NITCO amended answer at 21.

of that sum. Such contracts were not reduced to writing until well after the instant complaint was filed. We also note that the terms of the oral agreement under which Robert Mussman's company has paid his son substantial consulting fees has never been reduced to writing. Although NITCO purportedly employs Rhys Mussman as a consultant, his fees in 1983 equalled or exceeded his salary in 1982 as an employee. In addition, withholdings and benefits he receives while purportedly serving as a consultant are indicia of an employer-employee relationship, a conclusion bolstered by the fact that Rhys Mussman has earned no income in his purported role in the cable side of the family business. Furthermore, Rhys Mussman represented at public proceedings his father's participation in the cable enterprise. These facts, together with all of the other facts set forth in paras. 5-22, *supra*, lead to the conclusion that NITCO and Northwestern Indiana CableVision, both before and after the latter's incorporation, have been, and continue to be, affiliated companies within the meaning of Section 63.54 of the Commission's Rules and that they are acting in contravention of the Commission's rules.[40]

---

[40] Section 63.54, 47 C.F.R. § 63.54, as amended, provides as follows:

> (a) No telephone common carrier, subject in whole or in part to the Communications Act of 1934, shall engage in the furnishing of cable television service to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.
>
> (b) No telephone common carrier, subject in whole or in part to the Communications Act of 1934, shall provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provision of cable television

26. Defendants' reliance upon cases concerning multiple ownership of broadcast and/or cable television interests and sections in Parts 73 and 76 of our rules is misplaced. Such cases are not controlling since the terms "control" and "affiliate" as used in Section 63.54 are much more broadly defined than are those or similar terms in other Commission rules which do not involve common carrier issues. The terms "control" and "affiliate", as defined in Note 1(a) to Section 63.54, preclude NITCO from affiliating itself directly or indirectly with any company owned by, operated by, controlled by, or under common control with it. Also precluded is "any financial or business relationship whatsoever . . ." other than the ordinary telephone company relationship with subscribers to its telephone services. *Cf.*, 47 C.F.R. § 63.08(a).

27. Defendants also seek to justify their conduct by distinguishing certain cases in which the Commission disregarded the corporate facade of allegedly independent companies in order that the purpose of the Act and its regulations not be frustrated. They argue that they are independent companies dealing at arm's length and that there is no warrant for the Commission "to pierce their

---

services to the viewing public in the telephone service area of the telephone common carrier.

Note 1: (a) *As used above, the terms "control" and "affiliate" bar any financial or business relationship whatsoever* by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship. (emphasis added)

(b) Examples of situations in which a carrier and its customer will be deemed to be controlled or having a relationship include the following, among others: where one is the debtor or creditor of the other (except with respect to charges for communication services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other, and where any party has a financial interest in both.

See also Cross-Ownership Rules, *supra*, 82 FCC 2d at 264.

corporate veils" as was done in the cases of *Dimension Cable TV, Inc.*, 25 FCC 2d 520 (1970), *recon. denied*, 27 FCC 2d 43 (1971); *TeleCable Corporation*, 19 FCC 2d 574 (1969); and *Manatee Cablevision, Inc.*, 22 FCC 2d 841 (1970), *vacated on other grounds*, 35 FCC 2d 639 (1972). We note that such cases were designated for hearing before our telephone/cable television company cross-ownership rules were adopted. After adoption of these rules, there no longer is any need to designate cases for evidentiary hearings to determine whether telephone and cable television companies are under common business or financial control or whether they are nonaffiliated and truly independent of one another. Since 1970, when the rules were adopted, *any* financial or business relationship by a telephone company with an affiliated cable television system within its service area (other than the ordinary telephone customer relationship) is prohibited unless a waiver of the rules has been granted. Cable television service offered by an affiliated system is considered cable television operation by a telephone common carrier and is subject to the requirements of the rules "without any further necessity of piercing the corporate veil."[41] In light of the prohibition, NITCO would have had to obtain waiver of such rule, and grant of authority pursuant to Section 214(a) of the Act, (*see* para. 29, *infra*) before entering into pole attachment and other agreements with Northwestern Indiana CableVision.[42]

---

[41] *Section 214 Certificates, supra,* 22 FCC 2d at 751. *See also Armstrong Utilities, Inc.*, 25 FCC 2d 385, 388 (1970); *D&E Cable TV, Inc.*, 28 FCC 2d 24 (1971).

[42] Section 63.56(a), 47 C.F.R. § 63.56(a), as amended, provides as follows:

> In those areas where cable television service demonstrably could not exist except through a cable television system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause, the provisions of §§ 63.54 and 63.55 may be waived, on the Commission's own motion or on petition for waiver, if the

28. Since we have found that Defendants are affiliated companies within the meaning of Section 63.54 of our rules and that they have, without prior Commission authorization, entered into pole rental and other agreements with respect to construction and maintenance of cable television system facilities in Hebron, DeMotte and Lakes of the Four Seasons, Indiana, communities in which NITCO provides telephone exchange service, we conclude that NITCO has violated, and continues to violate the rule. Accordingly, we are issuing a Notice of Apparent Liability for Forfeiture against NITCO in the amount of $20,000 in accordance with Section 503(b) of the Act, 47 U.S.C. § 503(b), for willful and repeated violations of Section 63.54 of our rules.[43]

B. Section 214(a) certification

29. In *Section 214 Certificates, supra,* we properly disregarded the legal facade of separate corporate identities when the purpose of Section 63.54 of our rules would otherwise have been frustrated. Similarly, based upon undisputed facts of record here before us, the separate corporate identities of Defendants must be disregarded in order to preserve the integrity of the statutory scheme embodied in Section 214(a) of the Act.[44] It has long been settled that construction of cable facilities for transmission of broadcast television signals by a carrier consti-

---

Commission finds that the public interest, convenience and necesity would be served thereby.

See also CATV Service Area Standard, 86 FCC 2d 983, 991 (1981).

[43] According to data in its annual reports, as filed with the Indiana Public Service Commission, we note that NITCO's net income after taxes for the years 1981, 1982 and 1983 exceeded $372,000, $475,000, and $756,900, respectively. NITCO's 1983 earnings equated to a return on equity in excess of 18%. *See* Exh. 15-17 to NITCO's amended answer, at 13, line 56, col. (c) and 16, line 37, col. (b).

[44] *See General Telephone Co. of Southwest v. U.S., supra,* 449 F.2d at 855.

tutes construction of part of an interstate channel of communication requiring our prior certification under Section 214 of the Act that the present or future public convenience and necessity requires or will require such construction.[45] The fact that the cable television distribution facilities may be owned and operated by the cable television system, rather than leased from the telephone company, does not necessarily mandate a different result. *See Dimension Cable TV, Inc., supra,* 27 FCC 2d at 48.[46] While we have granted blanket authority to telephone companies to construct cable television distribution facilities *outside* of their exchange telephone service area, construction of such facilities by a telephone company *within* its exchange telephone service area for an affiliated cable system requires advance certification pursuant to Section 214(a) of the Act in order to, *inter alia,* ascertain compliance and enforce our cross-ownership rules before such construction may be lawfully undertaken.[47] On the basis of undisputed facts of record before us, we conclude that NITCO's construction cable television systems for Northwestern Indiana CableVision, its affiliated cable television system, in Hebron, DeMotte and Lakes of the Four Seasons, Indiana without having received prior authorization violated Section 214(a) of the Act.

C. Section 202(a) discrimination

30. We long have been concerned with unlawful discrimination vis-a-vis independent cable television companies by telephone common carriers with control over

---

[45] *General Telephone Company of California,* 13 FCC 2d 448, *recon. denied,* 14 FCC 2d 693 (1968), *aff'd.* 413 F.2d 390, *cert. denied,* 396 U.S. 888 (1969). *See also C&P Tel. Co.,* FCC 85-48, released January 30, 1985, at para. 16.

[46] *See also General Telephone Company of the Southwest v. United States,* 449 F.2d 846 (5th Cir. 1971).

[47] *Section 214 Authorization,* 98 FCC 2d 355, 356 (1984), at n. 3.

poles required for the construction of such cable systems.[48] Indeed, it was because of such concerns and the potential for anticompetitive abuses that we ultimately adopted our telephone/cable television cross-ownership rules. CCI has alleged that NITCO has engaged in anticompetitive conduct by offering more favorable terms and conditions for pole attachment to its affiliated company, Northwestern Indiana CableVision, than to its potential competitor for wideband cable distribution facilities, CCI. NITCO's conduct, in this regard, is alleged to be in violation of Section 202(a) of the Act.[49] In view of the actions ordered herein based on violations of Section 214(a) of the Act and Section 63.54 of our cross-ownership rules, we do not believe it necessary to reach CCI's contention that NITCO's conditions for attaching its poles are unreasonably discriminatory in violation of Section 202(a) of the Act.[50]

D. *Liability for damages*

31. As previously noted, in addition to a cease and desist order, CCI also seeks compensatory and punitive damages as well as attorney fees.[51] Having determined

---

[48] *See, e.g., Warrensburg Cable, Inc.*, 67 FCC 2d 662 (1978) and cases cited therein at 667.

[49] *Cf. Better T.V., Inc. of Dutchess County, New York*, 31 FCC 2d 939, 966-67 ~~(1971) ;~~ *Warrensburg Cable, Inc.*, 67 FCC 2d 662, 667-72 (1978).

[50] We concluded, prior to enactment of Section 224 of the Act, that we lacked regulatory jurisdiction over telephone company activity that constituted simply rental of available space on utility poles. *California Water and Telephone Co.*, 64 FCC 2d 753 (1977). Under Section 224 of the Act, 47 U.S.C. § 224, the Commission has authority to resolve disputes concerning alleged unreasonable conditions for attaching utility poles by cable television system operators. CCI did not seek to invoke such jurisdiction in its complaint.

[51] We have no power to award attorney fees and that request will be denied. *Strouth v. Western Union*, 70 FCC 2d 506, 511, 567

that NITCO has violated Sections 214(a) of the Act and 63.54 of our rules and that it is therefore subject to the damage provisions of Section 206 through 209 of the Act,[52] we find that CCI is entitled to any consequential damages it can establish. The parties are encouraged to negotiate a reasonable and mutually agreeable settlement as to the amount of damages to which CCI may be entitled and to otherwise reach an acceptable resolution of this dispute. We expect the parties to promptly undertake good faith efforts to negotiate such a settlement and to report the results back to us in due course. Should they notify us that such efforts have failed, the Chief, Common Carrier Bureau, will determine such further action as he deems necessary to resolve the issue.

IV. Conclusions and Ordering Clauses

32. Having found that NITCO and Northwest Cable are affiliated companies within the meaning of Section 63.54 of our rules and that they have, without prior Commission authorization, entered into pole rental and other agreements with respect to construction and maintenance of cable television system facilities, in continuing violation of such rule, we are issuing a Notice of Apparent Liability for Forfeiture against NITCO. Furthermore, because Defendants failed to obtain the necessary authorizations pursuant to Section 214(a) of the Act and 63.56 (a) of our rules to construct and operate cable television systems in Hebron, DeMotte, Lakes of the Four Seasons,

---

(1978); *See also Illinois Bell Telephone Co.*, FCC 80 M-181, released January 30, 1980, 46 R.R. 2d 1449 (1980) and cases cited therein. CCI also has not shown that we have authority to award punitive damages and that request too will be denied. *See Jean Gilhart v. The Chesapeake & Potomac Telephone Company of Maryland, Inc.*, unpublished, released October 2, 1984 at para. 5 (File No. E-83-21).

[52] Such sections provide, *inter alia*, for the recovery of damages before either the Commission or a district court of the United States of competent jurisdiction when a carrier does any thing prohibited by the Act or omits to do any thing required by the Act.

Indiana and any other areas in which NITCO provides telephone exchange service, NITCO shall, in the absence of such authorizations, be required to divest all facilities and terminate all affiliations between NITCO and Northwest Cable prohibited by Section 63.54.[53] NITCO will be directed to file within 40 days from the release of this order (a) its proposals to comply with our decision herein[54] including arrangements to minimize any interruption of cable television service to subscribing members of the public; and (b) the results of Defendants' efforts to negotiate a settlement with CCI with respect to CCI's claims for actual consequential damages.

33. In addition, we caution NITCO and Northwest Cable that, having found them in violation of the Act and our rules, we have legal grounds for directing Defendants to show cause why a cease and desist order should not be directed against them prohibiting NITCO from any further construction of cable television distribution facilities and any further leasing of pole space to Northwest Cable for operation of cable television distribution facilities in Hebron, DeMotte, and Lakes of the

---

[53] Defendants have been on notice that their actions might contravene the Commission's telephone/cable television company cross-ownership rules and that they might be required to divest themselves of the subject cable television system distribution facilities. *See* para. 24, *supra.* Defendants thus proceeded at their peril and cannot now be heard to complain should the divestiture ordered herein be required to preserve the integrity of the statutory scheme. including Section 613(b) of the Cable Communications Policy Act of 1984, and Commission policy decisions and rules. *Cf., Lake Telephone Co.,* 41 FCC 2d 335, 338-39 (1973), and *Fort Mill Telephone Co.,* 25 FCC 2d 748, 752-53 (1970), where we conditioned the grant of temporary authority to continue certain telephone company operations upon their divesting themselves of all interests in cable television service to the viewing public within their service areas.

[54] Such prohibited affiliations include, but are not limited to, the financial guarantees, consulting agreement, and leases referred to in paras. 14-18, *supra.*

Four Seasons without prior Commission authorization.[55] We will not hesitate to do so should Defendants undertake any additional unlawful construction or commence commercial cable television service to subscribers in Hebron, DeMotte, or Lakes of the Four Seasons who are not currently receiving such service. Further, we are also referring this matter to the Department of Justice under Sections 401 and 502 of the Communications Act for whatever action it may deem appropriate.

34. Accordingly, IT IS ORDERED, That, pursuant to Sections 4(i), 4(j), 202(a), 208, 214(a), 314 and 411(a) of the Communications Act, 47 U.S.C. § 154(i), 154(j), 202(a), 208, 214(a), 314 and 411(a), Defendants' motion to dismiss the complaint in this proceeding IS DENIED;

35. IT IS FURTHER ORDERED, That Defendants' motion for leave to file a response to the reply to their amended answers IS GRANTED;

36. IT IS FURTHER ORDERED, That Northwestern Indiana Telephone Company, Inc. SHALL TERMINATE any affiliation with Northwest Indiana CATV, Inc. prohibited by Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54, AND DIVEST any facilities prohibited by Section 63.54 by no later than six (6) months from the release of this Order, unless the Commission has granted appropriate waivers of Section 63.54 of its rules prior to that time;

37. IT IS FURTHER ORDERED, That, no later than 40 days from the release of this order, Defendants SHALL MAKE the filing specified in paragraph 31 herein;

---

[55] *Cf. Ashtabula Cable Tv, Inc.*, 17 FCC 2d 113, *recon. denied*, 18 FCC 2d 193 (1969); *Lake Telephone Co.*, 41 FCC 2d 335 (1973); *Fort Mill Telephone Company*, 25 FCC 2d 748 (1970), *temporary authority extended*, 31 FCC 2d 867 (1971).

38. IT IS FURTHER ORDERED, That complainant's claims for attorney fees and punitive damages ARE DENIED;

39. IT IS FURTHER ORDERED, That the parties SHALL UNDERTAKE good faith efforts to negotiate a settlement of complainant's claims for damages;

40. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, will determine what further actions, if any, should be initiated should the parties report that they have been unable to resolve the damage claims herein;

41. IT IS FURTHER ORDERED, That the complaint of Comark Cable Fund III, d/b/a CCI Cablevision, IS GRANTED to the extent indicated herein, and otherwise IS DENIED.

42. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules and Regulations, 47 C.F.R. § 1.80, That Northwestern Indiana Telephone Company, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of $20,000 for its willful and repeated violations of Section 63.54 of our Rules by furnishing pole space and other rental arrangements within its telephone service area to Northwest Cable without authorization pursuant to 47 C.F.R. § 63.56(a) to engage in such activities; and for its willful and repeated violations of 47 U.S.C. § 214(a) by constructing distribution facilities for cable television systems in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana without the requisite prior authorization of the Commission having been obtained.

43. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), That NITCO shall, within thirty (30) days of the release of this notice, pay the full amount of the

forfeiture in the manner provided for in Section 1.80(h) of the Rules or shall file a response showing why a forfeiture should not be imposed or should be reduced.[56]

44. IT IS FURTHER ORDERED, That the Secretary shall send by certified mail a copy of this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture to Defendants' counsel, David L. Nace, Esq., David L. Nace & Associates, One Thomas Circle, Washington, D.C. 20005.

45. IT IS FURTHER ORDERED, pursuant to Sections 401 and 502 of the Communications Act, 47 U.S.C. §§ 401 and 502, That the General Counsel shall refer this matter to the Department of Justice for whatever action it may deem appropriate.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

---

[56] Such a forfeiture amount should be booked to account 370, "Extraordinary income charges", which is a below-the-line account. 47 C.F.R. § 31.370. NITCO's annual operating revenue for the years 1981 through 1983 was in excess of $250,000. *See* annual reports of NITCO filed with the Indiana Public Service Commission, Exhibits 15-17 of NITCO's amended answer. Accordingly, NITCO is a Class A telephone company for accounting purposes. *See* 47 C.F.R. § 31.01(a).

APPENDIX G

STATUTORY PROVISIONS

47 U.S.C. § 152. Application of chapter

* * * *

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extendeded line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

* * * *

47 U.S.C. § 522. Definitions

For purposes of this subchapter—

(1) the term "affiliate", when used in relation to any person, means another person who owns or controls, is owner or controlled by, or is under common ownership or control with, such person;

(2) the term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;

(3) the term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

(4) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(5) the term "cable service" means—

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

(6) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1

or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

* * * *

47 U.S.C. § 533. Ownership restrictions

* * * *

(b) Common carriers; provision of direct video programming; exception; waiver

(1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

(2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owner by, operated by, controlled by, or under common control with such common carrier, if such facilities, or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

(3) This subsection shall not apply to any common carrier to the extent such carrier provides telephone ex-

change service in any rural area (as defined by the Commission).

(4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

* * * *

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1521

NORTHWESTERN INDIANA TELEPHONE COMPANY, INC.
and NORTHWEST INDIANA CATV, INC.,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

Monday, March 6, 1989
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 9:30 a.m.

Before: *Chief Judge* WALD, and *Circuit Judges* ROBINSON and STARR.

* * * *

[23] ORAL ARGUMENT OF DANIEL M. ARMSTRONG, ESQ., ON BEHALF OF RESPONDENTS

MR. ARMSTRONG: May it please the Court: On Mr. Lukas' reference to section 2(b)(2) of the Communications Act, the connecting carrier argument, this Court had that [24] argument before it in the General Tel of California Case, and the Court squarely considered it and squarely rejected the argument or did not find that the matter required much discussion, and so it only appeared as a footnote, in Footnote 19 of the Court's opinion in General Tel of California, which makes the point that the FCC does have jurisdiction over the cable television activities of connecting carriers.

Before I turn to the Commission's resolution of the issue which was ordered by this Court to be the subject of the remand, I would like briefly just to make clear what I believe Judge Wald understood our position was, and that is we do not—and Judge Starr as well—we do not believe that the fortuity of a limited remand gives the petitioners a second chance to try their case in this enforcement proceeding from scratch.

QUESTION: Could you entertain it if you wished? Did you have authority to?

MR. ARMSTRONG: Judge Wald, may I first say, with reference to your opinion in Eastern Carolinas, which came up, that was a 402(b) case, and 402(h) of the Communications Act was squarely applicable, and the Court in a footnote intimated that 402(h) might not have permitted the Commission to inject new issues into remand, as opposed to new evidence on an old issue.

There is, so far as we have been able to find out, [25] no precise counterpart to 402(h) which governs in a Hobbs Act case, so we do not take the position that the Commission would have been powerless had it been so inclined to make the occasion of this remand proceeding a forum for addressing some of these new issues. So our position is that we weren't required to, and there was certainly nothing in the Court's opinion that required us to.

Turning to the issue which was the subject of the remand, our position is that the Commission on remand reasonably addressed that issue.

QUESTION: Well, if that is where you are leaving it, do you want to tackle this point if the Constitution is in fact different and should truck exhaustion [values]?

MR. ARMSTRONG: Well, Judge Starr, insofar as—let's make a distinction here between a constitutional challenge to some aspect of the FCC's rules and a constitutional challenge, a facial constitutional challenge to the statute.

On the first point, the Court's opinion in NITCO I, in Footnote 8, squarely held that there is really no distinction between a constitutional challenge to an agency rule and any other argument against what an agency is doing, and the Court definitely held that that was subject to section 405 considerations.

By analogy, we would also believe that that sort of an argument is subject to the principle that someone who wants [26] to make that argument should have made it before the remand.

QUESTION: Well, that is fair in terms of one week before oral argument in court, advancing for the first time an issue that was not presented to the Commission. However, the fact remains that we are at Phase II. The case went back to the Commission, and you have suggested the possibility that the Commission, in the exercise of its discretion, could have addressed this issue. So, I am not sure that Footnote 8 needs to be given such a hard reading that would preclude you from considering it, and thus I think the point remains . . . should the . . . constitutional argument not truck the exhaustion values once it is back before the agency.

MR. ARMSTRONG: I think, Judge Starr, that certainly—and I think the point may have been alluded to when Mr. Lukas and Mr. Thorne was up here—there is no doubt that the Commission would not commit its resources to doing something which the Commission in its own view believes was unconstitutional. So, I think you can infer from that what is happening, and indeed from what the Commission said in the companion further notice of inquiry, that the Commission does not believe that it is enforcing a rule or a definition which is unconstitutional. So, the real question is whether or not the Commission, when it is confronted by a litigant who is saying you can't do what you think you can do, because of the First Amendment. The real question is whether the [27] Commission, in this already protracted proceeding, is required to commit some more resources to authoring that essay in which the Commission explains why it is not persuaded by the argument, and our position is that even when the party is couching its argument in constitutional terms, the Commission is not required on the remand proceeding to—

QUESTION: Well, let me follow that up, then. That makes it a little more difficult for us as a reviewing tribunal. I mean, if the Commission has made up its mind that we think this is constitutional enough or we are going to proceed down this line, we don't think we are doing something wrong or unconstitutional, but we are not going to talk about it.

MR. ARMSTRONG: Well, I would—

QUESTION: That was raised on review and I would assume that you have made that decision, but we don't have the grounds on it.

MR. ARMSTRONG: Well, we would hope, Judge Wald, that you would accept the argument that we have forcefully pressed in our brief, that the remand was not a reprieve to raise even a constitutional challenge to the rule, and therefore it is not properly the subject of the opinion before you at this time.

QUESTION: Let's grant that, let's grant that it is a limited remand. I think we are going beyond that and, you [28] are quite right, gee, we have a limited remand, we have got to look at Ohio Bell and C&P and alike, and so that is what we are going to do, but perhaps inadvertently the limited remand triggered the mere observation about the Commission's oath?

MR. ARMSTRONG: If you do not believe that because it is couched in constitutional terms, you can dismiss it in the manner in which we have urged, and you do not have the benefit of the agency's informed views, which we think are important not only on the statute, but certainly on the agency's own rules—

QUESTION: We should remand?

MR. ARMSTRONG: —we would urge you not to find that necessary, because I think there is clearly a vehicle available to you, if it is important and it is important if you reach the issue, by which you could obtain those views.

QUESTION: On limited remand?

[Laughter]

MR. ARMSTRONG: A mini remand, Your Honor.

QUESTION: Mr. Armstrong, of course at the time the charges in this case were filed, there was no legislation, the Commission was functioning under its own rules. But while the case was pending before the Commission on the first round, the Cable Act came into existence, and it was there before the first final decision by the Commission was made.

[29] And then there comes the remand, and on the remand the question arises, does it not, as to the law, at what particular time it is to be applied? Now, if it turns out that the Cable Act definition of "affiliation" should have been applied, instead of the definitions applied by the earlier Commission rule, then under those circumstances all of this discussion about the constitutional issue goes up yonder, doesn't it?

MR. ARMSTRONG: Yes, Judge Robinson, if you did dispose of the case on statutory grounds. On that point, may I address that point?

QUESTION: Yes, I wish you would.

MR. ARMSTRONG: The point that we would make is, we will just for a moment assume for purposes of the argument that the Cable Act definition of affiliation and ownership control is not as expansive as the Commission's definition of the term "affiliation" is, and the Commission, certainly after the effective date of the Cable Act, under that hypothesis, will be required to confine its enforcement in a manner consistent with the Cable Act.

But in this case, we are talking about conduct and relationships that predated the effective date of the Cable Act. That then raises the question of whether there is anything whatever in connection with the passage of the Cable Act that would suggest that Congress was saying whatever you [30] have done with respect to regulating cable television prior to the effective date of this Act is void ab initio, and our position is there is nothing to suggest that that was Congress' intent, therefore we had a rule, which we had jurisdiction to have in 1982, '83, '84, while these relationships were being created, and we would have a right, even if the enforcement proceeding is going on after the Cable Act has come into existence, to continue to insist upon exploring deliberate violations of that rule at a time when it was lawfully in effect. So, we don't think this case can be disposed of by the statutory argument.

QUESTION: Well, what do you do with the principle that I take it is well recognized now that administrative agencies, just like courts, ought to apply the law in effect at the time of decision and not some prior law?

MR. ARMSTRONG: Judge Robinson, I am certainly very much aware of that principle, and it is, I will concede, one that gave us much thought. But I do believe that when an agency does have a valid rule that is in effect, it is permitted to continue to consider the—

QUESTION: Well, then you say that the agency does not have to abide by that rule.

MR. ARMSTRONG: Well, I think that in the context of an agency's—

QUESTION: Well, I am asking what you do with the [31] rule?

MR. ARMSTRONG: With enforcement authority and the savings clause, I think Congress, as we pointed out in our brief—

QUESTION: Well, let's talk about the savings clause. I know that you suggest—

MR. ARMSTRONG: Let me respond and make one more point to your point. I think there are two things we have to distinguish here. The question is, insofar as the purpose of the agency is to bring the parties before it into compliance with the policy. Certainly the principle that you enunciated is completely applicable, and the Commission recognized that in the Eagle case. There were two aspects to that case.

At the time the Commission started its enforcement proceeding, Congress had not made the rural exemption automatic. That issue was raised as to whether or not someone had constructed a cable system in a rural area and whether or not that was permissible under the then Commission rule governing construction in rural areas.

While the proceeding was going on, Congress changed the statute and made the rural exemption automatic in any rural area, [it] no longer had the preconditions that the Commission was insisting upon. The Commission said—and the principle that he mentioned was not expressly stated, but, [32] look, we should apply the law as far as bringing people into compliance that is in effect at the time we are making our decision, so we will no longer say that there has to be a divestiture out in Colorado because what is going on out there right now is consistent with the law as declared by Congress which currently exists today.

But the question would still remain whether or not the conduct that was committed, at the time it was committed, was such a flagrant disregard of the norms by which regulated entities are supposed to conduct themselves at the time they engaged in these relationships, the question would still remain whether or not the agency, which is responsible for regulating in this area, would have the right to say that in our judgment the—certainly a forfeiture is permissible, that was in fact imposed in Eagle—now, the question is whether in this case the agency would have the right to go one step further and say we don't think a forfeiture is a sufficient punishment for what we have before us on this record and we think that, in order to enforce requirements here and let people know that they can face severe consequences if they don't adhere to requirements, we would have a right to say, even though it is not to bring you into compliance with the law that you have to divest, but you simply have to divest the fruit of illegal activity, and we think insofar as that second aspect of an enforcement proceeding is [33] concerned, we would not be limited by what the current law is.

QUESTION: Let me just clarify two historical events here. Am I correct that at the time of the first proceeding before the Commission, before it was completed and a final order had come out from the Commission, that would it have been possible for the petitioners to have raised two arguments: One, that the Cable Act applies, not your prior regulation; and, two, that, in any case, Note 1 of your prior regulation was in conflict with the affiliation definition? It would have been possible, correct?

MR. ARMSTRONG: The effective date of the Cable Act I think was December of '84, and our first order in this proceeding was March of '85, and yes, it would have been.

QUESTION: Secondly, is it your reading of the first NITCO opinion on the panel here, that they rejected those two arguments on the grounds they hadn't raised [them] before the Commission?

MR. ARMSTRONG: They rejected it on the procedural ground that it had not been raised, that's correct.

QUESTION: On this broader question of the law to be applied, perhaps there is undue sensitivity on your part, perhaps there need not be a flagrant violation. Law is law, and one simply cannot violate a law as long as it is in effect, and [Schooner], Peggy and its prog[e]ny raised a very delicate and troubling issue of the application of law that [34] had the effect of imposing liability post hoc, and that raises very fundamental, what we would now call due process concerns. But if it in fact was a violation of law, a regulation at the time, the fact that the regulation is repealed, even if the violation was not flagrant, whack away the violation.

MR. ARMSTRONG: Well, I appreciate the—

QUESTION: So the Commission says we were so misguided that we will, as an act of grace, wipe the slate clean of a prior non-flagrant violation.

MR. ARMSTRONG: As a matter of authority, Judge Starr—I appreciate that formulation and I would accept it, certainly it doesn't have to be flagrant. The only reason, in all candor, that I was emphasizing to Judge Robinson the flagrant point is that that issue was presented in the Eagle case and the Commission in that particular case did say that we are content, because we don't find this—

QUESTION: It might very well have been—

MR. ARMSTRONG: —because we would have insisted on divestiture.

QUESTION: It might affect the remedy.

MR. ARMSTRONG: Yes.

QUESTION: That is why we have savings clauses in statutes, except to do just exactly what you said, because if we didn't have them, the result would be the other way.

[35] MR. ARMSTRONG: Judge Robinson, you have got me at this point as to whether or not the savings clause was—

QUESTION: I have myself—and I can't remember the decision that I want to remember, but [it] says if you have got the trunk, if it has got the root, the branch will fail—I have forgotten that.

MR. ARMSTRONG: I must confess that I would not be able to say whether or not it would have been absolutely essential to have taken the step of the savings clause.

QUESTION: I do suggest to you seriously that you have something that, without [more], would be a violation of a Commission regulation, and Congress comes down with a statute. Now, by hypothesis, for purposes of discussion, we both have assumed that there is a difference between the scope of those two provisions, and it turns out—or if it should turn out that what is a violation of the Commission regulation would not be a violation of the statute, meaning necessarily that there is a conflict between the two, then it seems to me you have got a problem.

MR. ARMSTRONG: Well, I certainly think that if the conduct occurred after the effective date of the statute, I would not dispute the existence of the problem. I do think that it is relevant when the conduct occurred before the effective date of the statute, and it just simply happens that the enforcement proceeding had been protracted so long [36] that it hasn't been completed, the agency is still entitled to say do we find anything in what Congress did to indicate that Congress was retroactively repealing our rule. If we don't find that, then I think we ought to be entitled to continue with the enforcement proceeding.

QUESTION: Let me just ask one question along the same lines I asked Mr. Lukas, and that is assume for a minute that you are correct and there was a violation, that even you might have applied the old pre-Cable Act regulation, yet your remedy is divestiture. Now, if you have got an ongoing rule-making proceeding and apparently an interim policy to apply, if not to apply as strict a ruling as Note 1, what is the appropriateness of divestiture as a prospective remedy? It may go on, you know, it goes on for a little more, if in fact at some imminent time you are going to have a spate of law which says, assume for the hypothetical here, that it is okay, you have done that?

MR. ARMSTRONG: Judge Wald, even if we don't change the rule, it don't change the statute. If the divesiture that we are ordering, if [it] would take place and if it were to be a good-faith divestiture, no sham here, and Mr. [Rhys] Mussman has severed all ties with the telephone company and came back in two, three, four years to the Commission and said I have no more ties with the telephone company, this time we are going to do it right, I want to get back into the [37] cable business in this area, I do not contend here today that even with the statute staying in effect, he would be prohibited from doing that.

What we are [arguing] for [is] divestiture of the particular system that was the product of the violation. Now, I see that my time is up, but may I have one moment in the interest of hopefully ending litigation in this area?

THE COURT: Oh, yes, indeed you may.

[Laughter]

MR. ARMSTRONG: In the event that this Court would be prepared to affirm the Commission this morning, we would ask you to make it clear that the order you are affirming, as you understand it, is an order which requires Mr. [Rhys] Mussman to divest the cable systems that he owns in these three communities. I say this, because a different counsel for the Mussmans in the Federal District Court litigation in Indiana has taken the position before the District Judge there that the Commission's order in this case only require—the way it is worded in the ordering clause, they only require NITCO to divest itself of the cable system, and according to these parties NITCO doesn't own these cable system, so there is nothing to divest.

I call the Court's attention to paragraph 15 of the Commission's second order in this lengthy proceeding, which appears at Joint Appendix, page 1609, and respectfully submit [38] to you that that order ought to make it clear that, even though at some point the Commission's orders refer only to NITCO, the Commission's intent, if it is affirmed in this proceeding, is for Mr. [Rhys] Mussman to have to divest those cable system.

QUESTION: Mr. Armstrong, I am not going to let you get away that fast. I have one final question, which harks back to something we talked about, but I would like to get your final bottom-line position on, and that is on the constitutional argument that is raised by Mr. Thorne's group.

Now, admittedly, you can't ask an agency to declare its own enabling or its own acts unconstitutional, as we don't have the exhaustion remedy. You might like, as Judge Starr suggested, to have a shot at building a record, even though you can't entertain directly the constitutional challenge or at least rule on it.

I guess I am perplexed in reviewing in my mind quickly the discussion we had, but what in your view is the legitimate grounds, if there is one, on which we could avoid the constitutional issue?

MR. ARMSTRONG: Well, Judge Wald, we have begun to think, since our brief was filed, about some of the positions that were urged by our allies in this litigation as procedural bars to the facial challenge. Our co-respondent, United States, insisted in their brief that they do not believe the [39] telephone companies had standing, replying they referred to an FAA case, but that case in turn refers to this Court's decision in the California Association of the Physically Handicapped case, a case in which you are very familiar with, and—

QUESTION: I tried to recognize that.

[Laughter]

MR. ARMSTRONG: —two-member majority in that case, as you understood their opinion, seemed to be taking the position that, in order to have standing, injury has to come after the agency action, and if there is a situation where the alleged injury predates the agency action, there is no standing.

Under that principle, we have increasing difficulty at the Commission in understanding whether the telephone companies have standing in the particular [proceeding] now before the Court, because their injury from this prohibition certainly predated the Commission's order, so that would certainly be one argument that we would give you as to how you might avoid the issue.

We do think that we do appreciate the opportunity to build a record, even in a situation where the agency doesn't have the power at all to make decision, and indeed the Commission, in the first notice of inquiry in this very proceeding, without prompting, is certainly attempting to [40] explore these matters. But I must, in all candor, tell the Court that that notice, that further notice has generated an enormous response, the parties are at war with each other, there really isn't even any sort of preliminary consensus among the three Commissioners, if ever there was, so I think Mr. Thorne or someone said maybe full-speed ahead. But if we are going to have full-speed ahead, we would have to have some idea of where we're going. In all candor, that is difficult at the moment.

Thank you.

THE COURT: I appreciate your candor.

* * * *

APPENDIX I

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 88-530
File No. 48846-CL-P-183-A-86

In re Applications of

Rhys G. Mussman
d/b/a Dial 1 Mobile

For authority to construct and operate a Domestic Public Cellular Radio Telecommunications System on Frequency Block A in the Asheville, North Carolina MSA

and

File No. 71251-CL-P-302-A-86

Rhys G. Mussman

For authority to construct and operate a Domestic Public Cellular Radio Telecommunications System on Frequency Block A in the Enid, Oklahoma MSA.

MEMORANDUM OPINION AND ORDER

Issued: July 26, 1989; Released: July 28, 1989

1. Under consideration are Notice of Dismissal of Application and Motion to Dismiss Application, filed July 7, 1989 by Rhys G. Mussman d/b/a Dial 1 Mobile; Notice of Dismissal of Application and Motion to Dismiss Application and Terminate Proceeding, filed July 10, 1989 by Rhys G. Mussman d/b/a Dial 1 Mobile; and

Motion to Strike Proposed Findings of Fact and Conclusions of Law Filed by the Common Carrier Bureau and Intervenors, and to Order Repleading, filed March 21, 1989 by Rhys G. Mussman, d/b/a Dial 1 Mobile.

2. Rhys G. Mussman d/b/a Dial 1 Mobile moves to dismiss his applications for cellular radio licenses for Asheville, North Carolina and Enid, Oklahoma. These applications were designed for hearing to resolve matters involving Mr. Mussman's character which arose out of his failure to comply with Commission orders in another proceeding. That issue has not been resolved and Mr. Mussman's request for dismissal makes the issue moot in these proceedings. However, until the issue is resolved, Mr. Mussman must raise it in all other proceedings in which he is a party. The motion to dismiss will be granted.

ACCORDINGLY, IT IS ORDERED that the notice of dismissal of application and motion to dismiss application and terminate proceeding, filed July 7, 1989 and July 10, 1989 by Rhys G. Mussman d/b/a Dial 1 Mobile ARE GRANTED and Dial 1 Mobile applications (File No. 48846C-L-P-183-A-86 and File No. 71251-CL-P-302-A-86) ARE DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

IT IS FURTHER ORDERED that the motion to strike proposed findings of fact and conclusions of law filed by the Common Carrier Bureau and intervenors and order repleading, filed March 21, 1989 by Rhys G. Mussman d/b/a Dail 1 Mobile IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS
COMMISSION

/s/ Edward J. Kuhlman
EDWARD J. KUHLMAN
Administrative Law Judge

APPENDIX J

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 88-530
File Nos. 48846-CL-P-183-A-86 and
71251-CL-P-302-A-86

In re Applications of

RHYS G. MUSSMAN
d/b/a Dial 1 Mobile

For authority to construct and operate a Domestic Public Cellular Radio telecommunications system on Frequency Block A in the Asheville, North Carolina MSA and the Enid, Oklahoma MSA.

To: The Honorable Edward J. Kuhlmann
Administrative Law Judge

NOTICE OF DISMISSAL OF APPLICATION AND MOTION TO DISMISS APPLICATION

1. By order released November 28, 1988, the Commission designated the captioned applications for hearing to determine whether applicant Rhys G. Mussman ("Mussman") "failed to comply with an outstanding Commission order . . . when he failed to promptly divest himself of Northwest [Indiana CATV, Inc.] or to place Northwest in trust," and whether, as a result of such failure to comply, grant of the subject cellular radio applications to Mussman would be in the public interest, convenience and necessity.

2. On July 1, 1989, Mussman sold Northwest Indiana CATV, Inc., to an affiliate of U.S. Cable Corp., which has no relationship of any kind with Mussman or with any person or entity associated with Mussman. Mussman has no further interest in the cable company. He is therefore unquestionably now in compliance with the Commission's orders.

3. By letter dated July 1, 1989 (copy attached), Mussman has notified the Commission that he is withdrawing with prejudice his applications for a cellular license for the Enid, Oklahoma MSA, pursuant to a settlement agreement with parties unrelated to him.

4. As noted in the letter of July 7, 1989, a similar agreement has been reached with respect to the Asheville, North Carolina MSA with the other parties to CC Docket No. 88-530, and other parties, all of whom are unrelated to Mussman. However, as of 5:30 p.m., we have been unable to verify that the agreement has been signed by all parties. To comply with the Memorandum Opinion and Order of June 16, 1989, this filing is being submitted with respect to the Enid MSA at this time; we anticipate making a similar filing with respect to the Asheville MSA on Monday, July 10, 1989.

5. We believe that the withdrawal of Mr. Mussman's applications will moot these proceedings. Section 22.28 (b) of the Commission's Rules, 47 C.F.R. § 22.28(b), provides that an applicant who wishes to dismiss an application *without prejudice* after it has been designated for a hearing must file a written petition demonstrating compliance with § 22.29 (requiring notification that withdrawal is due to an agreement) and good cause. The Commission's rules contain no such requirements for applicants such as Mussman who wish to dismiss applications *with prejudice*. This distinction is eminently sound; the Commission presumably cannot compel an applicant to prosecute applications he wishes to abandon perma-

nently. Moreover, as the Commission noted in revising § 22.29, "we believe it is in the public interest to eliminate the prior approval requirement" for settlements. *Public Mobile Radio Services Rules*, 95 FCC 2d 769, 796 (1983), *on recon.*, 101 FCC 2d 799 (1985), *further recon.*, 2 FCC Rcd 1798 (1987).

6. However, out of an excess of caution, and to ensure that the matter is resolved promptly, Mussman hereby requests that the Administrative Law Judge enter an order dismissing his application for a cellular license for the Enid, Oklahoma MSA with prejudice.

Respectfully submitted,

WILLIAMS & CONNOLLY

/s/ Robert S. Litt
ROBERT S. LITT
JONATHAN P. GRAHAM
839 17th Street, N.W.
Washington, D.C. 20006
Attorneys for Rhys G. Mussman

Dated: July 7, 1989

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

Civil Docket No. H88-0163

RHYS G. MUSSMAN and NORTHWESTERN INDIANA
TELEPHONE CO., INC.,
Plaintiffs,
v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Defendants.

DEFENDANTS' REPLY TO SUPPLEMENT TO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES

[Filed August 11, 1988]

The Defendants Federal Communications Commission and United States of America moved to dismiss the captioned complaint on the grounds that the Court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief can be granted. In due course the motion was opposed by Plaintiffs and by the applicant for intervention (USTA), and the Defendants replied to those oppositions. Then, on the date set for the Defendants' reply—August 8, 1988—Plaintiffs filed a "Supplement to Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss" in order to bring to the Court's attention an FCC press release that was published weeks earlier on July 20, 1988. Defendants informed the Court of this press release in its August 8 reply.

Had the Supplement been filed in a timely manner, we the Defendants could have answered it in our August 8 reply to oppositions. Instead, Plaintiffs have chosen to interrupt the orderly pleading cycle. Because there is no apparent justification for this interruption, we would normally move to strike. However, such a motion would initiate a new round of pleadings, thus burdening the Court further. And more importantly, the Supplement is so replete with misstatements that a reply on the merits is necessary, which we hereby respectfully tender.

Plaintiffs erroneously state that the FCC has "decided to ask Congress to repeal the cross-ownership statute" and has "admi[tted] that the ban is no longer necessary and that less restrictive safeguards would be sufficient." Supplement at pages 2, 3. From these "facts" Plaintiffs conclude that "the government cannot advance either a compelling or substantial interest for the ban" and the Court must therefore find that the ban is unconstitutional. Supplement at page 3.

To set the record straight, the Commission has not determined that the cross-ownership ban no longer serves the public interest. Rather, as stated in the press release attached to the Supplement, the Commission has *tentatively* concluded that in light of changed market and regulatory conditions, there may now be means of protecting the public against anticompetitive behavior other than an outright ban on cross-ownership, and the Commission has accordingly elicited comments to explore those alternatives. The mere exploration of such alternatives by the expert agency charged by Congress to oversee the continually changing communications marketplace cannot, as Plaintiffs would have the Court believe, render the existing cross-ownership restriction unconstitutional. In any event, the complexity of the issues to be addressed by the Commission in this pending inquiry demonstrates even more forcefully the need for this Court to refrain from asserting jurisdiction in this case.

Plaintiffs also mischaracterize the proceeding now pending in the District of Columbia Circuit of which we informed the Court in our August 8 reply at page 4. Plaintiffs assert that the petition for review filed in that Circuit "in no way affects this lawsuit because the ultimate issues, parties, and requested relief in each action are distinct." Supplement at page 4 n.3. In fact, the parties are virtually identical and the central issue in the Complaint before this Court—whether the cross-ownership statute is facially unconstitutional—is squarely presented in the petition for review. *See* the Defendants' August 8 reply at page 4.

Thus, as stated in the August 8 reply, the Commission's announced intent to conisider the cross-ownership ban, as well as the recently-filed petition for review in the District of Columbia Circuit, support the motion to dismiss. The motion should be granted.

Respectfully submitted,

JAMES G. RICHMOND
United States Attorney

by /s/ Andrew B. Baker, Jr.
ANDREW B. BAKER, JR.
Assistant United States Attorney

Of counsel:

DIANE S. KILLORY
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

GREGORY M. CHRISTOPHER
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 632-7112

August 11, 1988